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90-1217

Supreme Court, U.S.
FILED
JAN 28 1991
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1990

Shirley M. Kearing,
Petitioner,

v.

The Honorable S. Martin Teel, Jr., et al,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
For the District of Columbia

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Since a conflict exists between the 4th Circuit's avouchment of Article I bankruptcy courts possessing certain contempt powers and the 5th and 9th Circuits' adamantine determination that contempt power is exclusively a power exercised only by an Article III court, was the petitioner's "due process" right guaranteed by Amendment V of the United States Constitution violated by her arrest and incarceration for contempt by a bankruptcy judge?

2. Does the United States Trustee, as enacted under Pub.L. 99-554 (cited as "Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986), accede to the concept of "separation of powers" within the Constitutional framework?

3. May the Federal Rules of Civil Procedure and Rules of Bankruptcy Procedure be controverted as mere oversight or technical error?

4. Does the "heightened pleading standard" mandated in Dewey v. University of New Hampshire, 694 F.2d 1 (1982) comport with Conley v. Gibson, 355 U. S. 41, 78 S.Ct. 99, 2 L.Ed2d 80 (1957) and Haines v. Kerner, 404 U. S. 519, 92 S.Ct. 594, 30 L.Ed2d 652 (1972)?

5. Is there a legally appointed and duly qualified trustee in this proceeding who could institute contempt proceedings and then prosecute in light of Young v. United States ex rel. Vuitland et Fils, S.A., 481 U.S. 787, 107 S.Ct. 2124, 95 L.Ed.2d 740 (1987)?

6. Are the requirements of §322 of Pub.L. 98-353, July 10, 1984, 98 Stat. 333 and §283(aa) of Pub.L. 99-554, October 27, 1986, applicable to individuals under Title 11, Chapter 11?

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11 U.S.C. 328(c)

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PETITION FOR WRIT OF CERTIORARI TO
The United States Court of Appeals
For the District of Columbia

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States

Shirley M. Kearing, the petitioner herein, respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the District of Columbia entered in this case.

OPINIONS BELOW

The October 10, 1990, order of the United States Court of Appeals for the District of Columbia Circuit, whose decision is herein sought to be reviewed, is found in Appendix

A, Court Orders & Opinions Sought to Be Reviewed as are all other orders and memorandum from the district court and the bankruptcy court.

JURISDICTION

The order of the United States Court of Appeals for the District of Columbia was entered on October 10, 1990. A timely petition for rehearing was filed on October 17, 1990. The Court of Appeals for the District of Columbia denied rehearing on October 29, 1990. The jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following are the citations of the constitutional and statutory provisions involved in the present case:

U. S. Const. art I, Sec. 1; U. S. Const.

art II, Sec. 1; U. S. Const. art III, Sec. 1; U. S. Const., amend. V [1791]; U. S. Const. art. I, Sec. 8, cl.4.; Section 322 of Pub.L. 99-353, July 10,1984; Section 283(aa) of Pub.L. 99-554, October 27, 1986; 11 U.S.C. 101(13)(A); 11 U.S.C. 101(30)(A); 11 U.S.C. 101(39); 11 U.S.C. 105; 11 U.S.C. 322(a); 11 U.S.C. 326(d); 11 U.S.C. 327(a); 11 U.S.C. 328(c); 11 U.S.C. 329(b); 11 U.S.C. 330; 11 U.S.C. 363(m); 11 U.S.C. 503(b)(1)(A); 11 U.S.C. 503(b)(2); 11 U.S.C. 521(3); 11 U.S.C. 1102(a)(1); 11 U.S.C. 1104(a); 11 U.S.C. 1104(b); 11 U.S.C. 1104(c); 11 U.S.C. 1106(a); 11 U.S.C. 1107; 11 U.S.C. 1129(b)(2)(B); 18 U.S.C. 1961(1)(D); 28 U.S.C. 157(a); 28 U.S.C. 157(b)(1); 28 U.S.C. 157(b)(2)(A); 28 U.S.C. 158(a); 28 U.S.C. 157(d); 28 U.S.C. 332(d)(1); 28 U.S.C. 372(c); 28 U.S.C. 566(a); 28 U.S.C. 586(a)(3)(A); 28 U.S.C.

586(a)(3)(B); 28 U.S.C. 586(a)(3)(F); 28 U.S.C. 586(a)(3)(G); 28 U.S.C. 586(A); 28 U.S.C. 586(B); 28 U.S.C. 586(F); 28 U.S.C. 586(G); 28 U.S.C. 1334(b); 28 U.S.C. 1334(c)(1); 28 U.S.C. 1334(c)(2); and 28 U.S.C. §1983.

STATEMENT OF THE CASE

This appeal emanates from Petitioner's allegations of illegal arrest and incarceration pursuant to a contempt order of the bankruptcy court for the District of Columbia. The bankruptcy court (Teel, J.) found Appellant in contempt of court after ordering her to comply with an appointed, but as of yet unqualified, trustee's motion to compel her cooperation. She refused not only to recognize the legality of that so-called trustee (thus his standing in the bankruptcy court), but she also refused to cooperate with him.

Utilizing Rule 9020 of the Rules of

Bankruptcy Procedure, the bankruptcy court instructed Petitioner to surrender herself to the United States Marshall or face arrest. The bankruptcy court extended Petitioner's time to file objections to a contempt order to October 24, 1988; however, on October 14, 1988, at 3:15 p.m. the United States Marshals arrested Petitioner.

Petitioner filed a complaint for damages (illegal arrest) against the bankruptcy judge and his clerk, the United States Trustee and his assistant, the so-called trustee, his attorney and his attorney's law firm with jurisdiction pursuant to the United States Constitution, Amendment V, and 42 U. S. C. 1983. An amended complaint later added the United States Marshal and three of his deputies.

Petitioner's amended complaint alleges that all respondents

> ..."under color of law" ... through malfeasance, misfeasance and nonfeasance of duty, did cause a tortious act by violating plaintiff's guaranteed fundamental protection of due process of law by consummating an illegal arrest and incarceration of the above-named plaintiff in blatant and malicious use of process in direct violation of the Constitution of the United States."

The lower courts held that the Petitioner's amended complaint failed to state a claim upon which relief may be granted pursuant to 12(b)(6) of the Federal Rules of Civil Procedure. The District Court also held that the plaintiff had failed to state a constitutional tort claim. Specifically, that court concluded that no claim existed under 42 U. S. C. 1983 because the amended complaint failed to allege any action by any person under color of state law. The District Court also found the amended complaint failed to state a Bivens claim against any of the federal appellees or against the non-federal defendants. That

court held that the so-called trustee took actions as trustee [a presumption that a legitimately appointed and qualified trustee was in place], a party to litigation that led to the contempt order against the plaintiff; therefore, "[t]his was not conduct under color of law and thus not a due process violation." And, the court continued on in a footnote

> A suit against a bankruptcy trustee for quasi-judicial actions, as opposed to actions undertaken as a party to litigation, would be subject to dismissal on immunity grounds. See Mullis v. U. S. Bankruptcy Court for the District of Nevada, 828 F.2d 1385 (9th Cir. 1987).

The district court dismissed the claim against the United States Trustee and his assistant for failure to meet the "heightened pleading" standard for a Bivens action. Moreover, the court held that the bankruptcy judge was entitled to absolute immunity under Bradley v. Fisher, 80 U. S. 335 (1871) and Stump v. Sparkman, 435 U. S.

349 (1978) since he was empowered to hold Petitioner in contempt [whether it be civil or criminal or both has never been determined by anyone] under Bankruptcy Rule 9020 and therefore did not act in the clear absence of all jurisdiction. The clerk of the bankruptcy court and the marshals were also held to have judicial immunity since their actions were closely associated with the judicial process. Nothwithstanding that, the marshals were entitled to at least qualified immunity under Harlow v. Fitzgerald, 457 U. S. 800 (1982).

Both lower courts continued that case law makes clear that the action must be dismissed "[i]f a plaintiff fails to allege direct evidence of unconstitutional intent and " ... such intent must be pleaded with specific, discernible facts or offers of proof that constitutes direct as opposed to merely circumstantial evidence of intent."

This reflects the district court's opinion in decisions of Whitacre v. Davey, 890 F.2d 1168, 1171 n. 4 (D.C. Cir. 1989) and Seigart v. Gilley, slip. op. at 9 (D.C. Cir. February 9, 1990) [Now cited as Seigart vs. Gilley, 895 F.2d 797 (D.C. Cir. 1990)].

Based on these findings, the Courts dismissed this case; this petition follows.

It is a sad day, indeed, in the annals of American jurisprudence when a court of appeals grants, with temerity, summary affirmance of a district court order denying the full protections afforded Petitioner by the Constitution of the United States whilst knowing "... how deficient [the appeal court's] procedures are in granting motions for summary affirmance ...." United States v. Glover, 731 F.2d 41, 48 et seq. (1984).

It is an insult to this Petitioner -- a

law-abiding and taxpaying citizen -- that the appeals court, in making short shrift of her appeal with such cursory treatment, totally ignored a meritorious complaint and released an order such as this

> The issue of whether the bankruptcy court has civil contempt powers has not been decided by this circuit. It is not necessary to resolve that issue here for appellant otherwise failed to state a claim against the appellees. The merits of the parties' positions are so clear as to justify summary action.

Nothing of the sort is "so clear."

> On summary judgment the inferences to be drawn from the underlying facts contained in such materials must be viewed in light most favorable to the party opposing the motion. Walker v. Washington, 627 F.2d 541 (1980) cert. denied 449 US 994.

Just what did the appeals court think the Petitioner was doing up in that court anyway? Was it not that she was arrested and incarcerated upon actions initiated by a legally questionable individual, who, operating under the guise of being a duly

appointed and legally qualified trustee convinced an Article I bankruptcy judge who knew (since, inter alia, the Petitioner in open court, beforehand, advised him of such) that he did not have the power to arrest or incarcerate anyone for any reason yet did otherwise? See In Re Omega Equipment Corp., 51 B.R. 569 (Bkrtcy. DC DC 1985) which happens to be the controlling case law on this bankruptcy judge for the D. C. Circuit.

The per curiam opinion of the appeals court "cannot erase the fact that major aspects of the normal appellate process are absent from this appeal." See United States v. Glover, 731 F.2d 41 (1984). For example:

(1) There was no oral argument. Id.;

(2) There is indication that this appeals court, once again, intends avoidance of either confirming or denying a lower court decision affirming Petitioner's contention that all contempt powers of an

Article I bankruptcy judge for the District of Columbia are nil and without those powers Petitioner was, indeed, denied her "due process" rights ;

(3) There was no tradional collegiality of the decisional process normal to a multi-member appellate court. Id.;

(4) Petitioner's appeal has not received the full attention of the court -- the attention it should have received ab initio; most significantly, once the motion for summary affirmance has been granted, the case has been decided on its merits. Id.

However, Petitioner has clearly raised a viable claim for relief and that dismissal and summary affirmance was not, and is not, warranted. Since the courts are "a public business," Petitioner believed her appeal goes to the essence of the appellate process and requires a "public airing."

To begin with, Harlow v. Fitzgerald, 457 U. S. 800, 818, as a first step in considering a defendant's liability, instructed the trial judge to determine

"whether [currently applicable] law was clearly established at the time an action occurred. This was never done. The District Court was correct in that it must not dismiss the complaint unless the plaintiff can prove no set of facts which would entitle her to relief. See Conley v. Gibson, 355 U. S. 41 (1957). Yet the lower courts totally ignored the "standard" presented in Haines v. Kerner, 404 U. S. 519 (1972), that it does not appear "beyond doubt that [Petitioner] can prove no set of facts in support of her claim which would entitle [her] to relief." Crisafi v. Holland, 655 F.2d 1305, 1309 (1981).

Pleadings are intended to serve as a means of arriving at fair and just settlements of controversies between litigants. They should not raise barriers which prevent achievement of that end. Maty v. Grasselli Co., 303 U. S. 197

(1938).

As Justice Black so aptly stated in Conley v. Gibson, 355 U. S. 41, 47:

> The decisive answer to this is that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is "a short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. The illustrative forms appended to the Rules plainly demonstrate this. Such simplified "notice pleading" is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues. Following the simple guide of Rule 8(f) that "all pleadings shall be so construed as to do substantial justice," we have no doubt that petitioners' complaint adequately set forth a claim and gave the respondents fair notice of its basis. The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.

Too, "[p]roper pleading is important, but

its importance consists in its effectiveness as a means to accomplish the end of a just judgment. Maty v. Grasselli Co., 303 U. S. 197 (1938).

"[The] district court dismissed ... complaint on the ground that it did not state a claim for which relief could be granted. The appeals court concurred. This is a dubious practice ...." Dewey v. University of New Hampshire, 694 F.2d 1, 3 (1982).

In dismissing the Petitioner's complaint, the district court also stated that the Petitioner had not complied with the "heightened pleading" standard. Yet, even though the district court might be forgiven, the appeals court should not:

> Dismissal of a claim requires the most close analysis by an appellate court, balancing the overall liberal thrust of the simplified civil rules on the one hand, see generally 5 Wright & Miller, Federal Practice and Procedure, Sections 1216, 1357, against the repeated demands by ... courts that

there be more than conclusory allegations, even in civil rights cases. Dewey v. University of New Hampshire, 694 F.2d 1, 3 (1982).

Therefore, although we must ask whether the "claim" put forward in the complaint is capable of being supported by **any conceivable set of facts**, we insist that the claim at least **set forth minimal facts**, not subjective characterizations, **as to who did what to whom and why**. [Emphasis added]. See Dewey v. University of New Hampshire, 694 F.2d 1, 3 (1982).

This demand, however, as set out in a dissenting opinion in Siegert v. Gilley, 895 F.2d 797, 806-807 (D.C. Cir. 1990), should give pause:

It is worth remembering that our heightened pleading standard has not as yet even been explicitly approved by the Supreme Court.

And finally, even if the arrest and incarceration of the Petitioner was inadvertent:

... judges are not absolutely immune from liability and damages for administrative, legislative, or executive functions that judges may occasionally be assigned by law to perform; it is nature of function

performed --adjudication --rather than identity of actor who performed it -- judge -- that determines whether absolute immunity attaches to act. Forrester v. White, 108 S.Ct. 538 (1988)

Petitioner and her husband (hereinafter referred to jointly as the "Kearings") are currently in a joint-petition bankruptcy proceeding.

Their financial difficulties began in early 1986 after they increased secured loans on their real property, incurred excessive consumer debt and made an imprudent investment in three (3) condominium units.

Petitioner does not believe that they are, in fact, legally in bankruptcy proceedings since the requirements of Section 322 of Pub.L. 99-353, July 10, 1984, Section 283(aa) of Pub.L. 99-554, October 27, 1986, F.R.Civ.P. 11 and Bankruptcy Rule 9011 were totally disregarded. Petitioner believes that the

following grievous and callous errors, mistakes, and unadulterated insanity that has occurred in this case are most pertinent for the likelihood of success before this Court; to wit: the United States Trustee never complied with his duties, pursuant to 11 U.S.C. 1102(a)(1), by his failure to appoint a committee of unsecured creditors -- regardless of his lame excuse in not believing that any could or would serve; he never complied with his duties, pursuant to 28 U.S.C. 586(a)(3)(A), by failing to monitor or investigate applications for compensation and reimbursements allowed or applied for under 11 U.S.C. 326, 328, 329, 330, and Rule 2016 of the Rules of Bankruptcy Procedure; he never complied with his duties, pursuant to 28 U.S.C. 586(a)(3)(B), by failing to monitor any plan of reorganization and to ascertain why no disclosure statement was,

or has been, ever filed when the Kearings, as debtors-in-possession, did file one; he never complied with his duties, pursuant to 28 U.S.C. 586(a)(3)(F), by his failure to notify the appropriate United States Attorney of matters which constitute a crime under the laws of the United States; and, he never complied with his duties, pursuant to 28 U.S.C. 586(a)(3)(G), by failing to monitor the progress of this case and to assure that all officers of the Court are adhering to the Code of Professional Conduct as determined in In re Smith, 5 B.R. 92 (Bkrtcy. D. DC 1982).

The Clerk of the Bankruptcy Court for the District of Columbia has failed miserably to perform his duties under Rule 9011 and 2013 of the Rules of Bankruptcy Procedure -- even though the Kearings have ask not only the district court but the appeals court also to issue a writ of

mandamus to force his performance.

The Kearings, as debtors-in-possession, fully complied with their fiduciary duties in this proceeding and could not be removed as debtors-in-possession since the Bankruptcy Court sent no notice and held no hearing as required by 11 U.S.C. 1102, received no testimony, entered no evidence, neither analyzed nor weighed any cost/benefits or cost/protection for appointment of a trustee; yet, the Bankruptcy Court found "cause" even though there had been no fraud, dishonesty, incompetence or gross mismanagement on the part of the Kearings and that the expense and inconvenience of a trustee was, and is, an adverse factor to any successful reorganization of this bankruptcy proceeding.

It is abominable that neither an examiner was appointed in this proceeding

as requested under 11 U.S.C. 1104(b)(1) by the Kearings in an application for an expedited hearing for such an appointment nor was any notice or hearing forthcoming from that application.

Regardless, the appointment of a trustee was totally inappropriate since no notice was given and no hearing on any motion for that appointment as mandated by 11 U.S.C. 1102 was held.

REASONS FOR GRANTING THE WRIT

Petitioner contends that the lower courts erred in that they did not allow her to invoke the pro se protection found in Haines v. Kerner, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed2d 652 (1972); found that she failed to state a "Bivens claim" (Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), even though her complaint alleged that the individuals named, ACTING ("under color of

law") IN AN OFFICIAL CAPACITY, violated her due process rights; stated that she failed to state a "claim" under Rule 12(b) of the Federal Rules of Procedure when, in fact, she defined the actions taken against her as "malfeasance, misfeasance and nonfeasance of duty" along with "blatant and malicious use of process" in denying her guaranteed fundamental protection of "due process"; found that the United States Bankruptcy Judge for the District of Columbia has contempt powers under Rule 9020 of the Bankruptcy Rules of Procedure, notwithstanding the "Omega ruling" as found in In Re Omega, 51 B.R. 569 (D.C. 1985); assumed that there is a legally appointed and duly qualified trustee in this bankruptcy proceeding who has authority to present a motion for show cause for contempt and seek sanctions by the Bankruptcy Court under Rule 9020 of the

Bankruptcy Rules of Procedure and that trustee and his attorneys are "quasi-judicial" officials; stated that her arrest and incarceration was due to negligence thereby avoiding a constitutional tort claim under 42 U.S.C. Section 1983; found that the United States Trustee and the assistant United States Trustee were only involved in the appointment of the so-called trustee; and, that it in and of itself "do[es] not amount to a specific allegation of constitutional violation" when 11 U.S.C. 1104(c), 28 U.S.C. Section 586(A),(B),(F) and (G), and In re Smith, 5 B.R. 92 (Bkrtcy. D. DC 1982), proscribe otherwise; found that the she failed to state a Respondeat Superior claim against the United States Trustee and the United States Marshal in light of what Haynesworth v Miller, 820 F.2d 1245 (DC Cir. 1987), at 1262 [13] and footnote 139, page 1263 said;

found that she failed to meet the "heightened pleading standard" by alleging violation of "due process" under the Fifth Amendment of the Constitution of the United States leading to illegal arrest and incarceration -- that in and of itself being a "specific deprivation of her rights" that are "clearly established," when viewed in light of In Re Omega, supra, which prohibits, unequivocally, the very actions that were undertaken and then accomplished; contorted the use of Bradley v. Fisher, 80 U.S. 335 (1871) and Stump v. Sparkman, 435 U.S. 349, given the Supreme Court's explanation and example in Stump at p. 356-7 along with citing from Bradley, 13 Wall., at 352, when the "Omega ruling" in the District of Columbia explicitly states that an Article I judge dealing with contempt in the District of Columbia wanders into pastures exclusively reserved

for Article III adjudication; and, is an Article I judge in the District of Columbia absolutely immune" when he knew, **IN ADVANCE**, that there is a "clear absence of **ALL** jurisdiction" for contempt sanctions by him; and decided that the Clerk of the Bankruptcy Court for the District of Columbia and United States Marshals for the District of Columbia were under "mistaken belief" that they were carrying out a valid contempt order of the United States Bankruptcy Court for the District of Columbia by causing her to be arrested on October 14, 1988, and thereby they were protected by 28 U.S.C. Section 566(a) and therefore "absolutely immune" even when taken in context with Haynesworth, supra.

CONCLUSION

This entire proceeding has become such a "travesty of justice" that the chilling effect on bankruptcy practice throughout

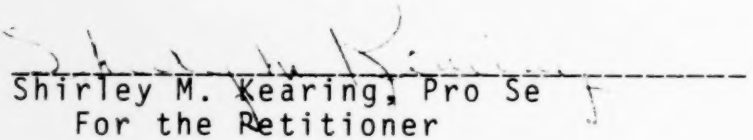
this country is in jeopardy if these gross irregularities are allowed to germinate, sprout and spread.

The bankruptcy process is a structured, basically administrative, field governed by constitutional and statutory law with definitive restrictions placed upon all the participants.

But this proceeding has become such a glaring example of "inside players making up the rules as they go along" that only the myopic would be remiss to encounter the utter contempt and disregard these "players" have had of the Petitioner's right to "due process" under the law as guaranteed by Amendment V of the United States Constitution and all the other myriad laws, procedures and protections that rightfully should be afforded her and others who haplessly wander into the quagmire of bankruptcy only to realize too

late that the courts -- in the Petitioner's case particularly -- have refused commitment to "equal justice under law" which only reinforces the Petitioner's belief that "[a] casual attitude toward human hurt and pain is the surest sign ... [of] the beginning of the end of a free society."

Respectfully submitted,



Shirley M. Kearing, Pro Se
For the Petitioner

AFFIDAVIT OF SERVICE

I, Shirley M. Kearing, depose and say that I am the petitioner in the foregoing case, and that on January 28, 1990, pursuant to Rule 28.5(c), Rules of the United States Supreme Court, I personally served three (3) copies of the foregoing "Petition for Writ of Certiorari," consisting of 29 pages, along with Appendices A, B, C, and D, on each of the parties required to be served as follows:

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Office of Solicitor General
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All parties required to be served have been served.

Shirley M. Kearing
SHIRLEY M. KEARING, Petitioner

Subscribed and sworn to before me on the 23rd day of ~~December, 1990.~~ JANUARY 1

Notary Public, DC

My Commission Expires January 14, 1992

Supreme Court, U.S.
FILED
MAR 14 1991
OFFICE OF THE CLERK

(8)

No. 90-1217

In the Supreme Court of the United States

OCTOBER TERM, 1990

SHIRLEY M. KEARING, PETITIONER

v.

THE HONORABLE S. MARTIN TEEL, JR., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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15 pp

QUESTION PRESENTED

Whether the district court correctly dismissed petitioner's complaint for failing to state a claim against any of the individual federal respondents.

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. A4-A5) is unreported. The memorandum opinion of the district court (Pet. App. A6-A18) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 10, 1990. A petition for rehearing was denied on October 29, 1990. Pet. App. A1-A3. The petition for a writ of certiorari was filed on January 28, 1991 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner and her husband are debtors in a pending Chapter 11 proceeding before the United States Bankruptcy Court for the District of Columbia. See *In re Leon R. & Shirley M. Kearing*, No. 86-00913 (Bankr. D.C.). Respondent, the Honorable S. Martin Teel, Jr., is presiding over that case. After having difficulties working with the Kearings to complete the reorganization, the court-appointed Trustee in Bankruptcy, John W. Guinee, Jr., filed with the bankruptcy court a "Motion to Compel Cooperation by Debtors." Pet. App. A47. On April 25, 1988, the court granted that motion and specifically ordered that petitioner "immediately turn over to the Trustee" rental payments received from tenants occupying several apartments owned by the Kearings, and further ordered that petitioner give the Trustee "all bank statements, cancelled checks, deposit slips and withdrawal slips for the [Kearings'] account at American Security Bank, N.A." *Id.* at A49. The court also ordered petitioner and her husband to make their northwest Washington home available to the Trustee in order for him to show it to prospective purchasers, *id.* at A47-A48, and expressly directed the Kearings to "cooperate with the Trustee in every other effort which he undertakes in the fulfillment of his statutory duties," *id.* at A50.

The Kearings did not comply with the bankruptcy court's order. As a result, on June 30, 1988, the court issued an order directing petitioner and her husband "to show cause why they should not be punished for civil contempt." Pet. App. A45. After a hearing, the court adjudged petitioner in contempt on September 30.[1] The court found that peti-

[1] After an initial hearing in July 1988, the court found that petitioner's husband was not in contempt of its order. Pet. App. A33-A34. At that time, the court postponed hearing petitioner's case in order to give her newly appointed counsel adequate time to prepare. See *id.* at A34-A35 & n.3.

tioner "failed to pay over $7,800 in rentals from units [the Kearings owned]," that petitioner "has failed to furnish to the Trustee copies of all [relevant] bank [records]," and that petitioner "refuses to cooperate with the Trustee in any way to obtain offers to purchase the house at 4801 Van Ness Street, N.W., and has failed to permit access to the property for purposes of showing it to prospective purchasers." *Id.* at A37.

On the same day, the bankruptcy court issued an order directing

> [t]hat 10 days after service of this Order, [petitioner] shall surrender to the United States Marshal and, if she fails to do so, the United States Marshal or his Deputy shall, subject to paragraph 4 [*sic*: 5] of this Order, seize [petitioner].

Pet. App. A23. Paragraph 5 of the court's order provided that

> pursuant to Bankruptcy Rule 9020, this Order shall be effective 10 days after a copy of it is served and shall have the same force and effect as an order of contempt entered by the District Court unless, within the 10 day period, [petitioner] serves and files with the Clerk of the Bankruptcy Court, objections to this Court's findings of fact and conclusions of law * * *.

Id. at A25.

Approximately two weeks later, at 3:15 p.m. on October 14, three United States Deputy Marshals (respondents Neely, Kerr, and Link) arrested petitioner and took her into custody on the basis of the outstanding court order. Earlier that day, however, the bankruptcy court had granted petitioner's motion for an extension of time to file objections to the contempt findings. Pet. App. A20. Once the bankruptcy court learned of petitioner's arrest and detention, it issued an

immediate order for her release at 4:02 p.m., October 14. *Id.* at A19.[2]

2. In October 1989, petitioner filed this federal court action against the following individual federal respondents: Judge Teel, Martin L. Bloom (Clerk of the Bankruptcy Court), John Waites (United States Trustee), Dennis Early (an employee of the Office of the United States Trustee), Herbert M. Rutherford (United States Marshal), and Deputy Marshals Neely, Kerr, and Link. Petitioner also named the court-appointed Trustee, John W. Guinee, Jr., and his legal counsel, Peter Kolker, Renee Hill, and the firm of Zuckerman, Spaeder, Goldstein, Taylor & Kolker, as defendants. As amended, petitioner's complaint alleged that

> [o]n or about October 14, 1988, at 3:15 p.m., under "color of law" [respondents], through malfeasance, misfeasance and nonfeasance of duty, did cause a tortious act by violating [petitioner's] guaranteed fundamental protection of due process of law by consummating an illegal arrest and incarceration of [petitioner] in blatant and malicious use of process in direct violation of the Constitution of the United States of America.

Pet. App. C17-C18. As relief, petitioner sought a total of $34 million in damages. *Id.* at C18-C19.

3. In February 1990, the district court dismissed petitioner's complaint for "failure to state a claim upon which relief may be granted." Pet. App. A10; see Fed. R. Civ. P. 12(b)(6). At the outset, the court pointed out that "[t]he complaint does not explain how the various [respondents]

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[2] On petitioner's appeal, the district court upheld the bankruptcy court's contempt finding. Pet. App. C31-C34. The district court later adjudicated petitioner and her husband in contempt for interfering with the Trustee's sale of their house. See *id.* at C20-C23.

were involved in the due process violation." Pet. App. A8.[3] Turning to the private respondents, the court concluded that "the amended complaint fails to state a claim under [42 U.S.C. 1983] because it alleges no action by any person under color of state law." *Id.* at A11. The court also concluded that the claims against the private respondents did not state a claim under *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971). Pet. App. A11.[4]

With respect to the federal respondents, the court held that the "amended complaint also fails to state a claim under *Bivens*." Pet. App. A11. First, the court determined that petitioner's allegations fell short of implicating respondents

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[3] The court then surmised:

> Rutherford is presumably a defendant because he is the supervisor of Neely, Kerr and Link, who allegedly executed the arrest. Judge Teel presumably [is] a defendant because he issued the contempt order, and Bloom is presumably in the case as Judge Teel's subordinate. Guinee, the trustee in the Kearing bankruptcy, is presumably a defendant by virtue of the fact that he sought and obtained from Judge Teel an order compelling the Kearings to provide him information, and [petitioner's] refusal to comply led to Judge Teel's contempt order. Early of the U.S. Trustees Office is presumably a defendant on account of his appointment of Guinee as trustee, and Waites is presumably a defendant because he is Early's superior. Kolker, Hill and the Zuckerman, Spaeder firm are apparently in the case because they represented Guinee in the bankruptcy litigation.

Pet. App. A8-A9.

[4] The court pointed out that Guinee's actions as a trustee did not amount to "conduct under color of law and thus was not a due process violation." Pet. App. A11-A12. The court therefore determined that "Guinee cannot be held liable under *Bivens*, and Kolker, Hill and Zuckerman cannot be held vicariously liable by virtue of their representation of him in carrying out his trustee function." *Id.* at A12. Moreover, the court recognized that "[a] suit against a bankruptcy trustee for quasi-judicial actions * * * would be subject to dismissal on immunity grounds." *Id.* at A12 n.1.

Waites and Early (the United States Trustee and his associate). As the court explained:

> The bare facts that Early was involved in the appointment of Guinee and that Waites is Early's superior do not amount to a specific allegation of constitutional violation.

Id. at A13. Second, the court found that "[t]o the extent that Judge Teel can be held responsible for the arrest, he is entitled to absolute immunity." *Ibid.* The court stated that since "bankruptcy judges clearly have contempt power, * * * Judge Teel did not act in 'the clear absence of all jurisdiction.'" *Ibid.* (quoting *Stump* v. *Sparkman*, 435 U.S. 349. 356-357 (1978)). Third, the court determined that such "[j]udicial immunity[, which] extends to other government officials for action closely associated with the judicial process," Pet. App. A13, "clearly covers clerk Bloom, * * * as well as the four marshals, who, pursuant to statutory duty, * * * were executing the order issued by Judge Teel," *id.* at A14.

In the alternative, the court held that "even if [respondent] marshals were not entitled to absolute immunity, they would be entitled to qualified immunity under *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), because a reasonable person in their situation would not have known that their conduct violated clearly established law." Pet. App. A14-A15. The court added that "[e]ven if it could be gleaned from [petitioner's] complaint that she was alleging that the marshal's conduct was undertaken pursuant to an unconstitutional motive, the case law makes clear that the action must be dismissed." *Id.* at A15 (citing *Whiteacre* v. *Davey*, 890 F.2d 1168, 1171 n.4 (D.C. Cir. 1989), cert. denied, 110 S. Ct. 3301 (1990); *Siegert* v. *Gilley*, 895 F.2d 797, 802 (D.C. Cir.), cert. granted, 111 S. Ct. 292 (1990) (argued Feb. 19, 1991)). The court stated that "[t]here is no evidence whatsoever that the marshals actually knew their conduct was

unlawful or acted for any reason other than because they did not know that Judge Teel had stayed his contempt order." Pet. App. A16.

4. The court of appeals affirmed the judgment dismissing the complaint. Pet. App. A4-A5. In a brief opinion, the court pointed out that although "[t]he issue of whether the bankruptcy court has civil contempt powers has not been decided by this circuit," *id.* at A5, that issue did not need to be reached in this case because petitioner "otherwise failed to state a claim against [respondents]," *ibid.*

ARGUMENT

1. Petitioner contends (Pet. i) that review of the judgment below is warranted because the courts of appeals are divided over whether a bankruptcy court has authority to enter dispositive judgments in civil contempt matters. Compare *In re Walters*, 868 F.2d 665, 669-670 (4th Cir. 1989) (court has civil contempt authority) with *In re Sequoia Auto Brokers Ltd., Inc.*, 827 F.2d 1281, 1283-1291 (9th Cir. 1987) (court does not have such authority); see also *In re Hipp, Inc.*, 895 F.2d 1503, 1509-1521 (5th Cir. 1990) (bankruptcy courts lack authority to punish for criminal contempt). Although such a conflict does in fact exist, the issue is not presented for resolution in this case because the federal respondents are in any event entitled to dismissal of the action against them.

With respect to Judge Teel, this Court has long held that a judge "will be subjected to liability only when he has acted in the 'clear absence of jurisdiction.'" *Stump* v. *Sparkman*, 435 U.S. 349, 356-357 (1978) (quoting *Bradley* v. *Fisher*, 80 U.S. (13 Wall.) 335, 351 (1872)). A mere claim that the judicial act "was in error, was done maliciously, or was in excess of [the judge's] authority" is insufficient. *Stump* v. *Sparkman*, 435 U.S. at 356. Under the current state of the

law, as one commentator has noted, "[i]t is * * * unclear whether and what [contempt] power exists" in the bankruptcy courts. 9 *Collier On Bankruptcy* ¶ 9020.03, at 9020-6 (L. King 15th ed. 1990). For that reason, petitioner's claim that Judge Teel acted in the "clear absence of jurisdiction" (Pet. 25) is wide of the mark. At best, petitioner can claim only that Judge Teel acted "in excess of his authority"; such a claim, however, does not overcome the judge's absolute immunity from suit. *E.g.*, *Stump* v. *Sparkman*, 435 U.S. at 356-357; *Mullis* v. *U.S. Bankruptcy Court*, 828 F.2d 1385, 1388-1389 (9th Cir. 1987), cert. denied, 486 U.S. 1040 (1988).[5]

With respect to Martin L. Bloom, the Clerk of the Bankruptcy Court, this Court has "extended absolute immunity to certain others who perform functions closely associated with the judicial process." *Cleavinger* v. *Saxner*, 474 U.S. 193, 200 (1985). For that reason, the lower courts have consistently held that "[c]ourt clerks have absolute quasi-judicial immunity from damages for civil rights violations when they perform tasks that are an integral part of the judicial process." *Mullis* v. *U.S. Bankruptcy Court*, 828 F.2d at 1390; see, *e.g.*, *Tarter* v. *Hury*, 646 F.2d 1010, 1013 (5th Cir.

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[5] Petitioner suggests (Pet. 24-25) that Judge Teel violated clearly established law in light of *In re Omega Equip. Corp.*, 51 Bankr. 569 (D.D.C. 1985), which held that bankruptcy courts lacked contempt authority. That lone decision cannot bear the weight petitioner would have it carry. First, as the court of appeals recognized, "[t]he issue of whether the bankruptcy court has civil contempt powers has not been decided by this circuit." Pet. App. A5; see *Zweibon* v. *Mitchell*, 720 F.2d 162, 171-172 (D.C. Cir. 1983), cert. denied, 469 U.S. 880 (1984). Second, the *Omega* decision predated the 1987 amendments to Bankruptcy Rule 9020, which governs contempt proceedings before bankruptcy courts. See 9 *Collier On Bankruptcy* ¶ 9020.03, at 9020-3 to 9020-5, 9020-8 (L. King 15th ed. 1990). Here, Judge Teel followed that rule in holding petitioner in contempt. See Pet. App. A25.

1981); *Panko* v. *Rodak*, 606 F.2d 168, 171 (7th Cir. 1979), cert. denied, 444 U.S. 1081 (1980). Here, petitioner did not allege that Bloom took any specific action regarding her arrest and brief detention on the contempt charge. As the district court stated, "Bloom is presumably in the case as Judge Teel's subordinate." Pet. App. A9. Since Bloom's only conceivable connection with the case is the performance of his duty to issue a duly entered court order, he is entitled to immunity from any claim based on that conduct.

Similar reasons account for the dismissal of petitioner's claim against Herbert M. Rutherford, the United States Marshal, and Deputy Marshals Neely, Kerr, and Link. As one court has explained, "law enforcement officials serving or executing writs valid on their face at the direction of judges are cloaked with the absolute immunity of the judges because they are performing ministerial acts at the direction of the Court." *Stoval* v. *Haynes*, 580 F. Supp. 97, 99 (W.D. Okla. 1983); see *Tymiak* v. *Omodt*, 676 F.2d 306, 308 (8th Cir. 1982); *United Steelworkers* v. *Bishop*, 598 F.2d 408, 414 (5th Cir. 1979). Such an immunity avoids the "manifest unfairness of subjecting one to suit as a consequence of action taken at the direction of officials [over] whom the individual actor has no control or power." *Lockhart* v. *Hoenstine*, 411 F.2d 455, 460 (3d Cir.), cert. denied, 396 U.S. 941 (1969).[6] Here, the Marshals executed a facially valid order calling for petitioner's arrest. Indeed, they had a statutory obligation to execute the bankruptcy court's order. See 28 U.S.C. 566(a); 28 U.S.C. 151; see also *McQuade* v. *United States*, 839 F.2d 640, 643 (9th Cir.

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[6] The situation of a law enforcement official carrying out a judicial directive is, of course, different from that of a law enforcement officer applying for a warrant, as in *Malley* v. *Briggs*, 475 U.S. 335, 339-345 (1986).

1988). In these circumstances, the Marshals' immunity requires dismissal of petitioner's *Bivens* claim.[7]

Since the federal respondents' absolute immunity defeats petitioner's *Bivens* claim, this case does not present the issue currently before the Court in *Siegert* v. *Gilley*, cert. granted, 111 S. Ct. 292 (1990) (argued Feb. 19, 1991), namely, whether in a *Bivens* action based on an official's alleged malice, the plaintiff must support his claim with more than conclusory allegations in order to proceed in the face of a qualified immunity defense. Indeed, as the district court indicated, see Pet. App. A15, it is doubtful whether petitioner's complaint even sought to allege that respondents acted in bad faith. Moreover, even if the complaint could be construed to make that allegation, the complaint nowhere spells out the clearly established constitutional right that turns on improper motive and that respondents allegedly violated. In these circumstances, there is no need for the Court to hold the petition pending the disposition of *Siegert*.

2. Although the remaining federal respondents, John Waites, United States Trustee, and Dennis Early, an employee of the Office of the United States Trustee, do not enjoy absolute immunity on the record presented, they too were entitled to dismissal of petitioner's lawsuit. As the district court pointed out, petitioner's complaint scarcely explains the basis for including Waites and Early as defendants in her broadside attack. The court volunteered that "Early * * * is presumably a defendant on account of his

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[7] With respect to Marshal Rutherford, petitioner made no effort to suggest that he participated either in her arrest or brief detention. See Pet. App. A8-A9, C16-C18. She therefore presumably sought to proceed on a *respondeat superior* theory. That common law tort doctrine, however, is not available to plaintiffs in *Bivens* actions. See *Jett* v. *Dallas Indep. School Dist.*, 109 S. Ct. 2702, 2722 (1989); *Boykin* v. *District of Columbia*, 689 F.2d 1092, 1099 (D.C. Cir. 1982).

appointment of Guinee as trustee, and Waites is presumably a defendant because he is Early's superior." Pet. App. A9.[8] Under the Federal Rules of Civil Procedure, however, a plaintiff "must, at the very least, specify the 'clearly established' rights [she] allege[s] to have been violated with 'sufficient[] precis[ion] to put defendants on notice of the nature of the claim and enable them to prepare a response.'" *Martin* v. *Malhoyt*, 830 F.2d 237, 254 (D.C. Cir. 1987) (quoting *Hobson* v. *Wilson*, 737 F.2d 1, 29 (D.C. Cir. 1984), cert. denied, 470 U.S. 1084 (1985)). Petitioner's complaint against Early and Waites falls far short of this minimal pleading requirement. See Pet. App. C14-C19, C26-C29. Accordingly, the courts below correctly dismissed petitioner's *Bivens* action against those remaining respondents.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART R. GERSON
Assistant Attorney General

BARBARA L. HERWIG
JOHN P. SCHNITKER
Attorneys

MARCH 1991

[8] To the extent petitioner sought to proceed against Waites based on the doctrine of *respondeat superior*, that attempt must fail. See note 7, *supra*.

U.S. GOVERNMENT PRINTING OFFICE: 1991—282-061/20433

90-1217

FILED
JAN 28 1991
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1990

Shirley M. Kearing,
Petitioner,

v.

The Honorable S. Martin Teel, Jr., et al,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
For the District of Columbia

APPENDIX A
COURT ORDERS & OPINIONS

Shirley M. Kearing, Pro Se
For the Petitioner
4200 Cathedral Avenue, N.W.
Washington, D.C. 20016
(202) 244-6198

FILED OCTOBER 29, 1990

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 90-5062 SEPTEMBER TERM, 1990
USDC Civ. No: 89-2837

Shirley M. Kearing,
Appellant,

v.

S. Martin Teel, Jr., U.S. Bankruptcy Court, et al,

BEFORE: Wald, Chief Judge;
Ruth B. Ginsburg and Williams,
Circuit Judges

O R D E R

Upon consideration of Appellant's Petition for Rehearing, filed September 17, 1990, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam

FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

FILED OCTOBER 29, 1990

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 90-5062 SEPTEMBER TERM, 1990
USDC Civ. No: 89-2837

Shirley M. Kearing,
Appellant,

v.

S. Martin Teel, Jr., U.S. Bankruptcy Court, et al,

BEFORE: Wald, Chief Judge;
Mikva, Edwards,
Ruth B. Ginsburg, Silberman,
Buckley, Williams,
D. H. Ginsburg, Sentelle,
Thomas, Henderscn and
Randolph,
Circuit Judges

O R D E R

Appellant's Suggestion for Rehearing En Banc has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court en banc, that the suggestion is denied.

Per Curiam

FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

FILED OCTOBER 10, 1990

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 90-5062 SEPTEMBER TERM, 1989
C. A. No. 89-02837

Shirley M. Kearing,
Appellant,

v.

S. Martin Teel, Jr., U.S. Bankruptcy Court, et al,

BEFORE: Wald, Chief Judge;
Ruth B. Ginsburg, Williams,
Circuit Judges

O R D E R

Upon consideration of the motions for summary affirmance and appellant's response to this court's order to show cause filed May 11, 1990, it is

ORDERED that the order to show cause order be discharged. It is

FURTHER ORDERED that the motions for summary affirmance be granted for reasons stated by the district court in its memorandum and order filed February 13,

1990. The issue of whether the bankruptcy court has civil contempt powers has not been decided by this circuit. It is not necessary to resolve that issue here for appellant otherwise failed to state a claim against the appellees. The merits of the parties' positions are so clear as to justify summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam); Walker v. Washington, 627 F.2d 541, 545 (D.C. Cir.) (per curiam), cert. denied, 449 U.S. 994 (1980).

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See D.C. Cir. Rule 15.

Per Curiam

FILED FEBRUARY 13, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHIRLEY M. KEARING, Plaintiff,	)	
v.	)	Civil Action No. 89-2837
THE HONORABLE S. MARTIN TEEL, JR., ET AL., Defendants.	)	

MEMORANDUM

On October 16, 1989, plaintiff Shirley Kearing filed this action against the Honorable S. Martin Teel, U.S. Bankruptcy Judge for the District of Columbia, Martin L. Bloom, clerk of the U.S. Bankruptcy Court for the District of Columbia, attorneys John Guinee, Peter Kolker, and Renee Franklin Hill, the law firm of Zuckerman, Spaeder, Goldstein, Taylor & Kolker, John Waites, United States Trustee, and Dennis Early of the Office of the United States Trustee. On January 22, 1990, Kearing submitted to the clerk's

office an "Amendment to Original Complaint for Damages (Illegal Arrest)," which the Court accepts for filing as an amended complaint. The amended complaint adds as defendants the United States Marshal for the District of Columbia, Herbert Rutherford, and his deputies, J. Neely, V. Kerr, and P. Link, and increases the relief sought from $29 million to $34 million.

All of the original defendants moved to dismiss the original complaint, and Kearing opposed. The original defendants plus the four added defendants have now moved to dismiss the amended complaint.

The amended complaint states that on October 14, 1988, defendants "through malfeasance, misfeasance, and nonfeasance of duty" caused "a tortious act" and violated plaintiff's due process rights by "consummating an illegal arrest and incarceration."

Apparently, on October 14, 1988, U.S. Marshals arrested Kearing in the mistaken belief that they were carrying out a contempt order issued by Judge Teel in connection with a bankruptcy proceeding. Judge Teel had indeed issued a contempt order on September 30, 1988, authorizing the Marshal to seize Kearing ten days after service of the order. However, Judge Teel, by order of October 14, 1988, the same day as Kearing's arrest, had extended Kearing's time to file objections to the contempt order to October 24, 1988. Kearing was arrested at 3:15 p.m. Upon learning of her detention, at 4:02 p.m. Judge Teel issued an order for her release.

The complaint does not explain how the various defendants were involved in the due process violation. Rutherford is presumably a defendant because he is the supervisor of Neely, Kerr and Link, who

allegedly executed the arrest. Judge Teel presumably a defendant because he issued the contempt order, and Bloom is presumably in the case as Judge Teel's subordinate. Guinee, the trustee in the Kearing bankruptcy, is presumably a defendant by virtue of the fact that he sought and obtained from Judge Teel an order compelling the Kearings to provide him information, and Mrs. Kearing's refusal to comply led to Judge Teel's contempt order. Early of the U.S. Trustees Office is presumably a defendant on account of his appointment of Guinee as trustee, and Waites is presumably a defendant because he is Early's superior. Kolker, Hill and the Zuckerman, Spaeder firm are apparently in the case because they represented Guinee in the bankruptcy litigation.

The amended complaint must be dismissed, pursuant to Rule 12(b)(6) of the Federal

Rules of Civil Procedure, for failure to state a claim upon which relief may be granted.

Arrest or imprisonment resulting from negligence does not amount to a constitutional tort. Baker v. McColan, 443 U.S. 137 (1979) (no § 1983 liability where defendant was arrested on valid warrant because of mistaken identity). However, the Court must not dismiss the complaint unless the plaintiff can prove no set of facts which would entitle her to relief, Conley v. Gibson, 355 U.S. 41 (1957), and Kearing could conceivably be claiming, although the available evidence suggests otherwise, that her arrest was not the result of mixed signals but rather a deliberate effort by some or all defendants to violate her rights. Nevertheless, Kearing has failed to state a constitutional tort claim.

Kearing relies on 42 U.S.C. § 1983 as the basis for jurisdiction of this action, but the amended complaint fails to state a claim under § 1983 because it alleges no action by any person under color of state law, only an arrest by federal marshals, perhaps with the complicity of other federal officials and others acting under the color of federal authority. See, e.g., Daly-Murphy v. Winston, 837 F.2d 348, 355 (9th Cir. 1987).

The amended complaint also fails to state a claim under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971).

The claims against the non-federal defendants do not state a Bivens claim. Guinee took actions as trustee, a party to litigation, that led to the contempt order against Kearing. This was not conduct under color of law and thus was not a due

process violation. See Dennis v. Sparks, 449 U.S. 24, 28 (1980). Accordingly, Guinee cannot be held liable under Bivens, and Kolker, Hill and Zuckerman, Spaeder cannot be held vicariously liable by virtue of their representation of him in carrying out his trustee function.[1]

The claims against Early and Waites must be dismissed for failure to meet the heightened pleading standard for Bivens actions, which requires specific allegations of constitutional violations by each defendant, see e.g., Martin v. Malhoyt, 830 F.2d 237, 254 (D.C. Cir.

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[1] A suit against a bankruptcy trustee for quasi-judicial actions, as opposed to actions undertaken as a party to litigation, would be subject to dismissal on immunity grounds. See Mullis v. U.S. Bankruptcy Court for the District of Nevada, 828 F.2d 1385 (9th Cir. 1987) (federal bankruptcy trustee absolutely immune for quasi-judicial actions); Simons v. Bellinger, 643 F.2d 774 (D.C. Cir. 1980) (members of D.C. Court of Appeals committee on unauthorized practice of law absolutely immune for quasi-judicial actions).

1987), with special pleading requirements for liability based on supervisor status. See Haynesworth v. Miller, 820 F.2d 1245, 1262-63 (D.C. Cir. 1987). The bare facts that Early was involved in the appointment of Guinee and that Waites is Early's superior do not amount to a specific allegation of constitutional violation.

To the extent that Judge Teel can be held responsible for the arrest, he is entitled to absolute immunity under Bradley v. Fisher, 80 U.S. 335 (1871) and Stump v. Sparkman, 435 U.S. 349 (1978). Contrary to Kearing's assertion, bankruptcy judges clearly have contempt power, Bankruptcy Rule 9020. Therefore, Judge Teel did not act in "the clear absence of all jurisdiction." Stump, 435 U.S. at 356-57.

Judicial immunity extends to other government officials for action closely associated with the judicial process. See

Cleavinger v. Saxner, 474 U.S. 193, 200 (1985). This doctrine clearly covers clerk Bloom, see Panko v. Rodak, 606 F.2d 168 (7th Cir. 1979), cert. denied, 444 U.S. 1081 (1980), as well as the four marshals, who, pursuant to statutory duty, see 28 U.S.C. § 566(a), were executing the order issued by Judge Teel. See U.S. Steelworkers of America, AFL-CIO v. Bishop, 598 F.2d 408, 414 (5th Cir. 1979) (marshals executing magistrate's order absolutely immune from suit).

For purposes of the motion to dismiss the Court must consider an alternative theory, namely that the marshals exercised independent discretion in carrying out the arrest. The Court concludes that, even if the marshals were not entitled to absolute immunity, they would be entitled to qualified immunity under Harlow v. Fitzgerald, 457 U.S. 800 (1982), because a

reasonable person in their situation would not have known that their conduct violated clearly established law. See also Anderson v. Creighton, 483 U.S. 635 (1987). Even if it could be gleaned from Kearing's complaint that she was alleging that the marshals' conduct was undertaken pursuant to an unconstitutional motive, the case law makes clear that the action must be dismissed. "If a plaintiff fails to allege direct evidence of unconstitutional intent, his claim must be dismissed immediately." Whiteacre v. Davey, 890 F.2d 1168, 1171 n.4 (D.C. Cir. 1989). "[I]n order to obtain even limited discovery, such intent must be pleaded with specific, discernible facts or offers of proof that constitute direct as opposed to merely circumstantial evidence of intent." Siegert v. Gilley, slip. op. at 9 (D.C. Cir. February 9, 1990). See also Martin v. D.C. Metro. Police Dep't.,

812 F.2d 1425, 1435 (D.C. Cir. 1987). There is no evidence whatsoever that the marshals actually knew their conduct was unlawful or acted for any other reason other than because they did not know that Judge Teel had stayed his contempt order.

For the foregoing reasons the motions to dismiss must be granted and the complaint dismissed.

A separate Order accompanies this Memorandum.

/s/ Gerhard A. Gesell
UNITED STATES DISTRICT JUDGE

February 13, 1990.

FILED FEBRUARY 13, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHIRLEY M. KEARING, Plaintiff,	)	
v.	)	Civil Action No. 89-2837
THE HONORABLE S. MARTIN TEEL, JR., ET AL., Defendants.	)	

ORDER

Upon consideration of the motions of the defendants dismiss the complaint and the first amended complaint and the oppositions thereto, and for the reasons stated in the accompanying Memorandum, it is hereby

ORDERED that plaintiff's "Amendment to Original Complaint" is accepted for filing as an amended complaint; and it is further

ORDERED that the unopposed motion of defendants Teel, Bloom, Early, Waites, Rutherford, Neely, Kerr and Link for enlargement of time to file an answer or response to plaintiff's amended complaint

is granted nunc pro tunc; and it is further

ORDERED that the motion of defendants Teel, Bloom, Early, Waites, Rutherford, Neely, Kerr and Link to dismiss plaintiff's first amended complaint is granted; and it is further

ORDERED that the motion of defendants Guinee, Kolker, Hill, and Zuckerman, Spaeder, Goldstein, Taylor & Kolker to dismiss plaintiff's first amended complaint is granted; and it is further

ORDERED that the complaint is dismissed with prejudice.

/s/ Gerhard A. Gesell
UNITED STATES DISTRICT JUDGE

February 13, 1990.

FILED OCTOBER 14, 1988
UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

In Re	)	
	)	
LEON R. AND	)	Case No. 86-00913
SHIRLEY M. KEARING,	)	(Chapter 11)
Debtors	)	

The United States Marshal for the District of Columbia is hereby directed to release Shirley M. Kearing from custody. The Court's order of contempt is not yet effective because the Court has granted Shirley M. Kearing an additional period of time, until October 17, 1988, to file objections to the order of contempt.

Dated: October 14, 1988, 4:02 p.m.

/s/ S. Martin Teel, Jr.
S. MARTIN TEEL, JR.
United States Bankruptcy Judge

FILED OCTOBER 14, 1988
UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

In Re	)	
	)	
LEON R. AND	)	Case No. 86-00913
SHIRLEY M. KEARING,	)	(Chapter 11)
Debtors	)	

O R D E R

Upon consideration of the motion of Shirley M. Kearing for an extension of time to October 24, 1988, in which to file objections to Findings of Fact, Conclusions of Law, and Contempt Order, and the matters of record herein, it is by the Court this 13th day of October, 1988,

ORDERED, that the said motion be and the same hereby is, granted, and the time for filing Objections pursuant to Bankruptcy Rule 9033 is extended to and including Monday, October 24, 1988.

/s/ S. Martin Teel, Jr.
S. MARTIN TEEL, JR.
United States Bankruptcy Judge

FILED SEPTEMBER 30, 1988
UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

In Re	)	
	)	
LEON R. AND	)	Case No. 86-00913
SHIRLEY M. KEARING,	)	(Chapter 11)
Debtors	)	

ORDER DENYING CONTEMPT MOTION
WITH RESPECT TO LEON R. KEARING

The Court's Order of August 16, 1986 [sic] vacated the Court's Order entered August 8, 1988 as moot. The Order of August 8, 1988 ought not have been vacated with respect to that part adjudging that Leon R. Kearing was not in contempt. Accordingly it is

ORDERED that Leon R. Kearing not be held in contempt pursuant to the Trustee's motion and Leon R. Kearing is hereby discharged from this Court's Order to Show Cause entered June 30, 1988.

Dated this 29th day of September 1988.

/s/ S. Martin Teel, Jr.
S. MARTIN TEEL, JR.
United States Bankruptcy Judge

FILED SEPTEMBER 30, 1988
UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

In Re	)	
	)	
LEON R. AND	)	Case No. 86-00913
SHIRLEY M. KEARING,	)	(Chapter 11)
Debtors	)	

ORDER OF CONTEMPT

The Court having rendered Findings of Fact and Conclusions of Law Re Contempt determining that Shirley M. Kearing is in contempt of the Court's Order of April 25, 1988, it is hereby ORDERED, ADJUDGED AND DECREED

1. That 10 days after service of this Order, Shirley M. Kearing shall surrender herself to the United States Marshal and, if she fails to do so, the United States Marshal or his Deputy shall, subject to paragraph 4 of this Order, seize Shirley M. Kearing.

2. That, upon the surrender to (or seizure by) the United States Marshal of

Shirley M. Kearing, the United States Marshal shall incarcerate Shirley M. Kearing.

3. Shirley M. Kearing shall remain incarcerated until she complies with this Court's Order of April 25, 1988, (1) by turning over to the Trustee all cancelled checks, deposit slips and withdrawal slips for the Debtor's account at American Security Bank, N.A. (Account No. 11-114-49-189) and (2) by cooperating with the Trustee in obtaining offers for the purchase of her house at 4801 Van Ness Street, N. W. and, in particular, by permitting access to the premises to allow the Trustee or his agent to show the house to prospective purchasers.

4. That the Trustee recover of Shirley M. Kearing, to replace the rental proceeds in that amount that she failed to turn over to the Trustee from units at 4444

Connecticut Avenue, N.W., the sum of $7,800 together with interest thereon after the date of entry of this order as provided by law.

5. That, pursuant to Bankruptcy Rule 9020, this Order shall be effective 10 days after a copy of it is served and shall have the same force and effect as an order of contempt entered by the District Court unless, within the 10 day period, Shirley M. Kearing serves and files with the Clerk of the Bankruptcy Court, objections to this Court's finding of fact and conclusions of law, said objections to be prepared in the manner provided in Bankruptcy Rule 9033(b) and District Court Local Rule 603.

Dated: September 29, 1988.

/s/ S. Martin Teel, Jr.
S. MARTIN TEEL, JR.
United States Bankruptcy Judge

NOTE: THE PRECEDING DOCUMENT HAD THE FOLLOWING MARSHALS' HANDWRITTEN ARREST STATEMENT APPENDED UNDERNEATH THE BANKRUPTCY JUDGE'S SIGNATURE:

10-14-88 - Fully executed the above order taking the above person in custody 3:15p.m.

signatures of

J. Neely DUSM
V. Kerr D.U.S.M.
Paul C(?) Link D.U.S.M.

FILED SEPTEMBER 30, 1988

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

In Re	)	
	)	
LEON R. AND	)	Case No. 86-00913
SHIRLEY M. KEARING,	)	(Chapter 11)
Debtors	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW
RE CONTEMPT

The Trustee has brought a civil contempt proceeding concerning the alleged failure of Shirley M. Kearing to comply with an order of this Court entered April 25, 1988. Evidence was presented at a hearing of September 20, 1988, and counsel made arguments. The Court makes the following findings of fact and conclusions of law pursuant to Bankruptcy Rule 9020.

FINDINGS OF FACT

1. On April 25, 1988, this Court entered an order granting the Motion to Compel Cooperation by Debtors filed by the Trustee, John W. Guinee, Jr. There the

Court, in pertinent part,

> ORDERED, that the Debtors cooperate with the Trustee and his agent(s) in an effort to obtain offers to purchase the real property [known as 4801 Van Ness Street, N.W., Washington, D. C.] by maintenance of the premises in a clean and orderly condition * * * and to otherwise reasonably assist in obtaining high prices for any offers to purchase; and to allow prospective purchasers to examine the premises, upon 2-1/2 hours advance notice from a real estate agent, during the hours of 12 noon to 5:00 p.m. Monday through Friday and from 1:00 p.m. to 5:00 p.m. on Sunday;
>
> * * * * *
>
> ORDERED that the Debtor Shirley Kearing immediately turn over to the Trustee, the funds of Debtors at the American Security Bank, N.A. (the Court finding that these funds represent rents received after the trustee was appointed) and that the Debtor, Shirley Kearing, immediately turn over to the Trustee, any and all rents that she may in the future collect from the tenants of units 201,

> 502 and 504, 4444 Connecticut Ave., N.W., Washington, D. C. and that the Debtor, Shirley Kearing, direct said tenants to make all future rent payments directly to the Trustee; * * *
>
> ORDERED that the Debtor, Shirley Kearing, mail to the Trustee by April 17, 1988, copies of all bank statements, cancelled checks, deposit slips and withdrawal slips for the Debtors' account at American Security Bank, N.A.; * * *
>
> ORDERED that the Debtors cooperate with the Trustee in every other effort which he undertakes in the fulfillment of his statutory duties.

That Order is subject of a motion for leave to appeal but it has not been stayed pending appeal.

2. Debtor Shirley M. Kearing failed to turn over $7,800 in rents collected from the tenants of units 201, 502 and 504, 4444 Connecticut Ave., N.W., Washington, D. C. after entry of the April 28 order directing

her to turn over all rents to the Trustee. According to Mrs. Kearing, the funds have been dissipated in litigating various aspects of her bankruptcy case.

3. The Debtor, Shirley M. Kearing, has also failed to turn over the funds of the Debtors at American Security Bank, N.A. The Trustee, however, has not shown clear and convincing evidence that the account contained any funds when the April 25, 1988 Order entered.

4. Debtor Shirley M. Kearing failed to mail the Trustee copies of all bank statements, cancelled checks, deposit slips and withdrawal slips for the Debtors' account no. 11-114-49-188 at American Security Bank, N.A. The Trustee has obtained copies of the account statements from the bank for January 20, 1988, through July 18, 1988, attached, but does not have copies of the other items. (Copies of the

account statements for January 20 through July 18, 1988, are attached to Movant's Exhibit 2 for the September 20, 1988 hearing.)

5. Debtor Shirley M. Kearing refuses to cooperate in any way with the Trustee's efforts to obtain an offer for the purchase of the house at 4801 Van Ness Street, N.W. and, in particular, has refused to allow the Trustee access to the premises to show it to prospective purchasers.

6. Shirley M. Kearing has four tenants at 4801 Van Ness Street, N.W., and has entered into a written lease with each. She refused to permit the Trustee to examine and copy the written leases and has refused to divulge the names of the tenants (other than that of her son who is one of the tenants). Her refusal to provide this information was not raised in the Trustee's motion requesting the Court to order Mrs.

Kearing to appear and show cause why she should not be held in contempt.

7. Shirley M. Kearing has refused to permit the Trustee to examine and copy her Federal income tax returns for the years 1981 and 1984 through 1987, copies of which she has in her possession. The 1981 return contains information essential for the Trustee to be able to complete reports and take action required by his statutory duties because the last residence of Debtor Shirley M. Kearing before 4801 Van Ness Street, N.W. was sold in 1981. See Movant's Exhibit 2 at pa. 37. The 1981 return will help the Trustee ascertain the Debtors' basis in the 4801 Van Ness Street property, since the return will likely reflect an election to defer recognition of any gain on the sale of the former residence with a resultant reduction of the basis in their new residence at 4801 Van

Ness Street. Shirley M. Kearing similarly refused to turn over to the Trustee her income tax returns for the years 1984, 1985, 1986 and 1987, tax years of obvious relevance to the Trustee in the administration of this case.[2]

8. On June 30, 1988, this court entered an Order to Show Cause, directing the Debtors to show cause on July 13, 1988, why they should not be held in contempt for failure to comply with the Order of this Court entered April 25, 1988, as alleged in a motion filed by the Trustee. After hearing evidence and for the reasons stated on the record at the hearing of July 13, 1988, the Court found Leon R. Kearing to

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[2] Although the Trustee could request that copies of the returns at issue be provided by the Internal Revenue Service (see 28 U.S.C. Section 6103(e)(5)(A), he presumably desires to avoid the expense, delay and uncertainty that would entail where the information can be quickly obtained from the debtors.

not be in contempt. Shirley M. Kearing requested appointed counsel. Eventually, counsel was appointed and a completely new hearing was held as to Mrs. Kearing pursuant to the show cause order on September 20, 1988.[3]

---

[3] The procedural background leading to that hearing was as follows. At the hearing of July 13, 1988, Mrs. Kearing indicated that she had attempted to obtain the services of an attorney and no one had agreed to represent her. The Court understood her to be referring to attempts to obtain representation for the entire case, not representation specifically for the contempt proceeding. Mrs. Kearing queried concerning her entitlement to appointed counsel. Although Mrs. Kearing is clearly not entitled to appointed counsel in the entire case, the Court later determined as a matter of law that, if indigent, Mrs. Kearing could not be held in contempt and incarcerated without first being afforded appointed counsel for the contempt proceeding. Accordingly, the Court entered an order on August 8, 1988, directing Mrs. Kearing to appear on September 14, 1988, to address the questions of why she had been unable to obtain counsel and the extent of any exempt assets or post-petition assets held by her that might be available for payment of coercive contempt sanction if she were held in contempt and monetary sanctions were deemed an appropriate remedy.

9. Shirley M. Kearing has no income of her own and has insufficient assets from

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On August 15, 1988, Mrs. Kearing and the Trustee's attorney were present for a hearing on another matter before the Court. Both agreed to address the aforementioned questions at that hearing. After hearing arguments, the Court concluded that incarceration would likely be the only effective coercive contempt sanction. Accordingly, the Court entered an order on August 16, 1988, directing Mrs. Kearing to submit an affidavit establishing her entitlement to appointment of counsel under the Criminal Justice Act by August 19, 1988, and, in the event of appointment of counsel, to appear on September 14, 1988, for a new hearing to show cause why she should not be punished for civil contempt of court for failing to comply with the order entered on April 25, 1988.

On August 31, 1988, Mrs. Kearing belatedly filed the required affidavit under the Criminal Justice Act. On September 14, 1988, the Court entered an order concluding that Mrs. Kearing was entitled to appointed counsel and appointed Joseph Zitomer to appear and defend on her behalf with respect to the motion by the Trustee to hold her in contempt for failure to comply with the order of April 25, 1988. Upon Mr. Zitomer's request, the September 14, 1988 hearing was continued to September 20, 1988, in order to give Mr. Zitomer an opportunity to familiarize himself with the matter.

which to pay a coercive contempt fine.

CONCLUSIONS OF LAW

A. Applicable Standards

1. In civil contempt proceedings the movant carries the burden of showing contempt by clear and convincing evidence. NLRB V. Blevins Popcorn Co., 659 F.2d 1173, 1183 (D.C. Cir. 1981). In addition, an injunction must have given specific notice of the conduct required in order for contempt to be present. Terminal R.R. Assn. v. United States, 266 U.S. 17, 29 (1924); In re Rubin, 378 F.2d 104, 198 (3rd Cir. 1967); Fidelity Mortg. Investors v. Camelia Builders, Inc., 550 F.2d 47 (2nd Cir. 1976).

B. Conduct As to Which Contempt Exists

2. Applying those standards, it is plain that Shirley M. Kearing is in contempt of this Court's Order of April 25, 1988, in the following regards:

A. She failed to pay over $7,800 in rentals from units at 4444 Connecticut Ave., N.W.

B She has failed to furnish to the Trustee copies of all bank statements, cancelled checks, deposit slips and withdrawal slips for Debtors' Account No. 11-114-49-188 at American Security Bank, N.A.

C. She refuses to cooperate with the Trustee in any way to obtain offers to purchase the house at 4801 Van Ness Street, N.W., and has failed to permit access to the property for purposes of showing it to prospective purchasers.

3. Shirley M. Kearing argues that she is not required to comply with this Court's order of April 25, 1988, because she is appealing the previous order that appointed a Trustee and the order of April 25, 1988.

Those prior orders have not been stayed.[4] Hence, they are enforceable orders until overturned.

4. Nor is it a defense that Mrs. Kearing may believe in good faith that her appeals of the prior orders excuse her compliance with the order of April 25, 1988. Willfulness is not a valid defense in a civil contempt proceeding, unlike in a criminal contempt proceeding. McComb v. Jacksonville Paper Co., 336 U.S. 187, 191

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[4] Mrs. Kearing argues that the proceeding to hold her in contempt was stayed by the District Court's Order filed August 12, 1988 in Civil Action No. 88-1232, the appeal from, inter alia, the Bankruptcy Court's order of April 25, 1988. That order of August 12, 1988 merely requested the Bankruptcy Judge to make a certification under District Court Local Rule 604(c) to assist the District Court in making a determination whether to allow an appeal and directed "that all further proceedings with respect to this appeal are stayed pending submission of the Bankruptcy Judge's written certification ...." It stayed only proceedings in the District Court on the appeal, not any contempt proceeding in the Bankruptcy Court.

(1949).

5. The Trustee is entitled to a compensatory contempt award of $7,800 with respect to Mrs. Kearing's failure to pay over rents from tenants at the Connecticut Avenue units.

6. The Trustee is entitled to a coercive contempt sanction with respect to the remaining items of contempt.

7. Mrs. Kearing does not have any source of income or significant assets of her own. Accordingly, the only appropriate coercive sanction is to incarcerate her as long as she fails to comply with this Court's order.

B. Conduct As To Which Contempt Does Not Exist

8. With respect to the Trustee's remaining allegations of misconduct by Mrs. Kearing (namely, the failure to turn over income tax returns and the identities and

leases of tenants at 4801 Van Ness Street), none of these allegations was presented by the Trustee's original motion. However, the attorneys for the Debtor and the Trustee agreed to discuss the status of the case after the hearing of September 14, 1988 (see note 2 at page 5, supra) and at the September 20, 1988 hearing the Debtor raised no objection that she had not had full notice that these allegations would be heard. Thus, the Debtor waived any objection that she was deprived of the protections of the requirement in Bankruptcy Rule 9020 that the written notice of contempt hearing "state the essential facts constituting the contempt charged."

9. In alleging that the Debtor should be held in contempt for her failure to turn over the tax returns and the identities of the tenants of 4801 Van Ness and copies of

their leases for that property, the Trustee relies on the provisions of this Court's Order of April 25, 1988, requiring the Debtors to cooperate with the Trustee in carrying out his statutory duties.

However, an order compelling compliance will not form the basis for holding the Debtor in contempt for failing to undertake certain acts if the acts were not specifically required by the order. See cases cited in paragraph 1, supra. As the Supreme Court has stated:

> In contempt proceedings for its enforcement, a decree will not be expanded by implication or intendment beyond the meanings of its terms when read in light of the issues and the purpose for which the suit was brought; and the facts found must constitute a plain violation of the decree so read. [Citations omitted.]

Terminal R.R. Assn., 266 U.S. at 29.

10. The order for cooperation was entered in accordance with 11 U.S.C. Section 521(3) which requires the Debtor to "cooperate with the Trustee as is necessary

to enable the Trustee to perform the Trustee's duties under this title." The Court is with undoubted power to command compliance with the Debtor's statutory duties under 11 U.S.C. Section 105.[5]

11. The April 25, 1988, order was

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[5] In McComb v. Jacksonville Paper Co., 336 U.S. 187, 193 (1949), the Court held that the possibility of continued disobedience of statutory obligations, where a proclivity for unlawful conduct in that regard had been shown, "proclaims the necessity of decrees that are not so narrow as to invite easy evasion." Nevertheless, the Supreme Court has at the same time stricken injunctions that compel general compliance with an entire statute. New York, New Have, & Hartford R.R. Co. v. ICC, 200 U.S. 361, 404-5 (1906). When an injunction is too indefinite to be affirmed on appeal in any regard, it is necessarily too indefinite to be a grounds of contempt. See Longshoreman's Asso. v. Marine Trade Asso., 389 U.S. 64, 76 (1967). The Court, for purposes of this contempt proceeding, may not question the validity of the Order of April 25, 1988. Accordingly, the Court does not address whether the provision, requiring cooperation generally, is invalid but only whether it was sufficiently specific as to the conduct involved to give rise to contempt. Whether the provision is valid and enforceable as to other conduct not before the Court is not decided here.

concerned with specific acts of non-cooperation. Although these acts evidenced a general lack of cooperation by the Debtors, the question of furnishing income tax returns and the leases and identities of tenants at 4801 Van Ness Street had not yet surfaced and was not addressed. Although leases of the units at 4111 [sic] Connecticut Avenue were required to be produced, no specific order was entered directing the production of leases of any other property held by the Debtors. Although certain bank records were required to be produced, no mention of tax returns was made.

12. For these reasons, the Court can not conclude that the Order of April 25, 1988, plainly required Mrs. Kearing to produce the income tax returns and the identities and written leases of tenants at 4801 Van Ness Street and their written

leases.

13. Therefore, the Court shall deny the Trustee's motion to hold Mrs. Kearing in contempt for failing to produce income tax returns and the identities and written leases of tenants at 4801 Van Ness Street, N.W. It is regrettable that Mrs. Kearing continues to engage in her self-defeating non-cooperation with the Trustee, thereby unnecessarily increasing the administrative expenses in this case. But that cannot justify holding her in contempt when no order specifically required the production of those returns and tenant information.

CONCLUSION

An appropriate Order shall be entered.

Dated: September 29, 1988.

/s/ S. Martin Teel, Jr.
S. MARTIN TEEL, JR.
United States Bankruptcy Judge

FILED JUNE 30, 1988

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

In re:	)	
	)	
LEON R. AND	)	Case No. 86-00913
SHIRLEY M. KEARING,	)	(Chapter 11)
Debtors	)	

ORDER TO SHOW CAUSE

Upon consideration of the Motion for Issuance of Show Cause Order filed by the Trustee, and this Court's April 25, 1988 order granting the Motion to Compel Cooperation of the Debtors filed by the Trustee, and it appearing to the Court that good cause exists for the issuing of an order to show cause, it is this 27th of June, 1988,

ORDERED that Leon R. and Shirley M. Kearing shall appear in this Court on July 13, 1988 at 2:00 p.m. and show cause why they should not be punished for civil contempt of court because of their misconduct in failing to obey, comply with

and carry out the provisions of the order granting the Motion to Compel Cooperation of the Debtors filed by the Trustee, duly entered herein on April 25, 1988, as set forth in the Memorandum filed in support of the Motion for Issuance of Show Cause Order.

/s/ S. Martin Teel, Jr.
UNITED STATES BANKRUPTCY JUDGE

FILED APRIL 25, 1988

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

In Re	)	
	)	
LEON R. AND	)	Case No. 86-00913
SHIRLEY M. KEARING,	)	(Chapter 11)
Debtors	)	

ORDER

This matter having come before the Court on the Motion to Compel Cooperation by Debtors Filed by John W. Guinee, Jr., Trustee herein, and it appearing to the Court that good cause exists for the granting of said Motion, it is, this 23rd day of April, 1988

ORDERED that Leon R. and Shirley M. Kearing make available for inspection the real property owned by said Debtors, including 4801 Van Ness St., N. W., Washington, D. C., by the Trustee and/or an agent to be designated by the Trustee, at 12 noon to 5:00 p.m. Monday through Friday and from 1:00 p.m. to 5:00 p.m. on Sunday,

as reasonably necessary to determine the marketability of the home, at a time to be fixed in writing delivered to Debtors' home by 13 hours in advance or by telephone 3 hours in advance; and it is further

ORDERED that the Debtors cooperate with the Trustee and his agent(s) in an effort to obtain offers to purchase the real property designated above, by maintenance of the premises in clean and orderly condition, so as to make the premises attractive to prospective purchasers, and to otherwise reasonably assist in obtaining high prices for any offers to purchase; and to allow prospective purchasers to examine the premises, upon two and one-half hours advance notice, from a real estate agent, during the hours of 12 noon to 5:00 p.m. Monday through Friday and from 1:00 p.m. to 5:00 p.m. on Sunday; and it is further

ORDERED that the Debtor Shirley M.

Kearing immediately turn over to the Trustee the funds of Debtors at the American Security Bank, N. A. (the Court finding that these funds represent rents received after the Trustee was appointed) and that the Debtor, Shirley Kearing, immediately turn over to the Trustee any and all rents that she may in the future collect from the tenants of Units 201, 502 and 504, 4444 Connecticut Avenue, N. W., Washington, D. C., and that the Debtor, Shirley Kearing, direct said tenants to make all future rent payments directly to the Trustee; and it is further

ORDERED that the Debtor, Shirley Kearing, mail to the Trustee by April 17, 1988 copies of all bank statements, cancelled checks, deposit slips and withdrawal slips for the Debtors' account at American Security Bank, N. A., and it is further

ORDERED that the Debtors cooperate with the Trustee in every other effort which he undertakes in the fulfillment of his statutory duties.

/s/ S. Martin Teel, Jr.
S. MARTIN TEEL, JR.
United States Bankruptcy Judge

FILED FEBRUARY 1, 1988

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

In Re:	)	
Leon R. and	)	
Shirley M. Kearing	)	
Debtors	)	Case No. 86-00913
	)	(Chapter 11)

ORDER

Upon consideration of the Debtors' "emergency application for a temporary restraining order and motion for a stay of order pending appeal," it is

ORDERED that the application and the motion are both DENIED. See this Court's Order of December 31, 1987 explaining at some length its reasons for denying the Debtors' application for removal of the trustee and for appointment of an examiner. In addition, with respect to the points raised in various numbered paragraphs of the Debtors' application and motion:

Paragraph 4: 11 U.S.C. Section 1104(c) does not require the U.S. Trustee to

consult with all parties in interest when appointing a trustee, and it would be an obvious impossibility for him to do so in cases where there are a large number of creditors. Since debtors cannot receive any distribution unless all creditors either are paid in full or else consent (11 U.S.C. Section 1129(b)(2)(B)), the U.S. Trustee does not ordinarily consult with debtors before appointing a trustee.

Paragraph 5: Section 322(a) does not require a trustee to file an acceptance of appointment. It is this Court's understanding that Mr. Guinee is covered by a blanket bond.

Paragraph 6: The trustee can hardly be expected to complete his investigation of the debtors and file a statement thereon under 11 U.S.C. Section 1106(a) while the Debtors are actively contesting his authority to act as trustee at all.

Paragraph 7: The allegations of paragraph 7 of the Debtors' application and motion tend to show that the trustee has at least started to perform his duties, notwithstanding the Debtors' obstructionism.

Paragraph 8: The trustee is not under any obligation to notify debtors in writing of anything.

Paragraph 9: Whether the Debtors' former attorney should turn over same or all of the papers in his possession to the Debtors' new attorney or to the Trustee is not free from doubt, thus justifying the former attorney in refusing to turn over files to either party, if he so chooses until their respective rights are resolved. The Clerk of this Court makes all public files available to any members of the public, and this Court rejects the Debtors' contrary assertion.

In this Court's view, the Debtors application and motion are legally frivolous and designed solely to harm the Trustee and to cause delay.

Dated: January 29, 1988.

/s/ Geo. Bason, Jr.
George Francis Bason, Jr.
United States Bankruptcy Judge

FILED JANUARY 4, 1988

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

In Re:	)	
Leon R. and	)	Case No. 86-00913
Shirley M. Kearing	)	(Chapter 11)
Debtors	)	
	)	

ORDER

Upon consideration of the December 23, 1987 emergency application of Leon R. and Shirley M. Kearing, debtors, by their attorney, Michael R. Huffstetler, for removal of the Chapter 11 trustee, John W. Guinee, Jr., and for appointment of an examiner; and

It appearing that at the hearing held on November 6, 1987 counsel for Chevy Chase Savings Bank, F.S.B. ("Chevy Chase") articulated reasons which in this Court's opinion constituted sufficient "cause" under 11 U.S.C. Section 1104(a)(1) to appoint a trustee, should the Debtors fail to retain qualified counsel within a

reasonable time, in view of the Debtors' obvious lack of competence to represent themselves as debtors in possession pro se, without the assistance of qualified counsel, in this rather complex Chapter 11 bankruptcy case; and

The Court being (both then and now) of the further view that "such appointment [of a trustee] is in the interests of creditors ... and ... the estate" under 11 U.S.C. 1104(a)(2); and

Neither the Debtors nor any other party in interest having filed any opposition to Chevy Chase's motion to appoint a trustee within the twenty-day period specified in this Court's notice dated November 12, 1987; and

It appearing that Mr. Guinee is highly qualified and well experienced as a Chapter 11 trustee, having served as such in this and other courts in a number of difficult

and complex cases; and

It appearing that, so far as the record reveals, Mr. Huffstetler, however competent he may be as an accountant and as an attorney, has had little or no experience in complex Chapter 11 bankruptcy cases as counsel for debtors in possession; and

It further appearing that, contrary to the Debtors' assertion in their pro se "application ... for leave to hire attorney ...," that Mr. Huffstetler is "not a[n] ... insider" and "is ... a disinterested person": (a) Mr. Huffstetler has revealed in his supporting "affirmation" that both he and his law partner Michael F. Solomon are nephews-in-law of Debtor Shirley M. Kearing; (b) accordingly under 11 U.S.C. Section 101(39) they are her "relatives"; (c) therefore they are "insiders" as defined by 11 U.S.C. Section 101(30)(A)(i); (d) thus they are not "disinterested

persons" as defined in 11 U.S.C. Section 101(13)(A), and (e) hence by the express terms of 11 U.S.C. Section 327(a), as incorporated by 11 U.S.C. Section 1107, Mr. Huffstetler is prohibited from serving as counsel for these debtors as debtors in possession; and

It further appearing that none of the "reasons for rescission of court Order to appoint trustee and removal of appointed trustee" set forth on pages 5-7 of the Debtors' December 23, 1987 emergency application is meritorious; and

It further appearing that 11 U.S.C. Section 1104(b) permits appointment of an examiner only "[i]f the court does not order the appointment of a trustee under" Section 1104(a)[sic]; it is

ORDERED that the Debtors' December 23, 1987 emergency application is DENIED.

Dated: December 31, 1987.

/s/ Geo. Bason, Jr.
George Francis Bason, Jr.
United States Bankruptcy Judge

FILED DECEMBER 10, 1987

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

In Re:	)	
Leon R. and	)	
Shirley M. Kearing	)	
Debtors	)	Case No. 86-00913
	)	(Chapter 11)

ORDER

Upon consideration of the oral motion, made at a duly scheduled hearing held on November 6, 1987, by Chevy Chase Bank for appointment of a Chapter 11 Trustee in this case, and after notice and opportunity for hearing, and no opposition or request for hearing having been filed, and good cause having been shown, based on the record of this case, it is

ORDERED that the motion is granted, and the U.S. Trustee is hereby directed to appoint a Chapter 11 trustee in this case.

Dated: December 9, 1987.

/s/ Geo. Bason, Jr.
George Francis Bason, Jr.
United States Bankruptcy Judge

FILED DECEMBER 3, 1987

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

In Re:	)	
Leon R. and	)	Case No. 86-00913
Shirley M. Kearing	)	(Chapter 11)
Debtors	)	
	)	

ORDER AUTHORIZING PAYMENT OF ADMINISTRATIVE EXPENSES; GRANTING APPLICATION FOR LEAVE TO WITHDRAW AS COUNSEL FOR DEBTORS IN POSSESSION; AND PROVIDING FOR OTHER RELIEF

Upcn consideration, at a hearing held herein on November 6, 1987, of the application filed herein on behalf of Debtors in Possession Leon R. Kearing and Shirley M. Kearing for authority to pay specified administrative expenses from Debtors' Estate and the application filed by Alfred Lawrence Toombs, Esq., the attorney of record for such Debtors in Possession, for a supplemental award of compensation and the reimbursement of expenses incurred on behalf of such Debtors

in Possession in this proceeding from April 16, 1987 through August 15, 1987, as to which Notice pursuant to B.R. 2002(b) was given and filed herein on September 17, 1987; and of the application of Alfred Lawrence Toombs, Esq., the attorney of record for such Debtors in Possession, for leave to withdraw his appearance herein, it is this 17th day of November, 1987,

ORDERED, pursuant to 11 U.S.C. §503(b)(1)(A), that Alfred Lawrence Toombs, Esq., the attorney of record for Debtors in Possession is hereby AUTHORIZED to pay, from the funds of Debtors' Estate held by him in escrow, to the following secured creditors the following post-petition costs and expenses of preserving Debtors' real property located at 4801 Van Ness St., NW, Washington, D.C. 20016 with respect to the months of August and September, 1987:

(a). Chevy Chase Savings Bank: Monthly first deed of trust payments of

$2288.18 per month, plus late charges of $69.23 per month, for a total of $4,714.82;

(b). U.S. Mortgage Investment Group, Inc.: Monthly second deed of trust payments of $600.00 per month, plus late charges of $30.00 per month, for a total of $1,260.00;

and it is further

ORDERED, in accordance with 11 U.S.C. §503(b)(2), that the foregoing amounts shall be ALLOWED as administrative expenses of the Debtors' Estate; and it is further

ORDERED, pursuant to District Court Local Rule 201(c), as incorporated by reference in Bankruptcy Court Local Rule 3(a)(2), that the application of Alfred Lawrence Toombs, Esq. for leave to withdraw his appearance herein as attorney for Debtors in Possession is hereby GRANTED; and it is further

ORDERED that Debtors in Possession are hereby urged (as they have stated they intend) to retain new counsel to represent

them as Debtors in Possession in this proceeding, who shall enter an appearance herein on or before December 7, 1987; and it is further

ORDERED, that in the event that Debtors in Possession fail to retain such new counsel on or before December 7, 1987, the Court intends, unless cause to the contrary be timely shown, to appoint a Trustee herein pursuant to 11 U.S.C. §1104(a); and it is further

ORDERED, that the Clerk of this Court shall give all creditors and other parties in interest twenty days' notice, in the form prescribed by B.R. 2002, of the renewal, at the hearing held herein on November 6, 1987, of the motion previously filed herein by Chevy Chase Savings Bank for the appointment of a Trustee pursuant to 11 U.S.C. § 1104(a); and it is further

ORDERED, that Alfred Lawrence Toombs,

Esq. is hereby DIRECTED to continue to retain in an interest bearing account over his signature all funds of Debtors' Estate held by him in escrow as of the date of this Order, pending such further Order of the Court as may be entered upon the retention of new counsel by Debtors in Possession or the appointment of a Trustee pursuant to 11 U.S.C. § 1104(a); and it is further

ORDERED, that Alfred Lawrence Toombs, Esq. is hereby AUTHORIZED AND DIRECTED to surrender to Debtors in Possession or to any new counsel retained by them, against written receipt therefor, all stock certificates or credit cards of Debtors in Possession held in safekeeping by such counsel; and it is further ORDERED, that Alfred Lawrence Toombs, Esq. is hereby RELIEVED of any further responsibility to marshal, collect or safeguard funds or

property of Debtors' Estate, and it is further

ORDERED, that the application of Alfred Lawrence Toombs, Esq. for a supplemental award of compensation and the reimbursement of expenses incurred on behalf of Debtors in Possession in this proceeding from April 16, 1987 through August 15, 1987 is hereby taken under advisement for a period of thirty days, during which Debtors in Possession and such counsel are encouraged to resolve their disputes regarding such application; and it is further

ORDERED, that Alfred Lawrence Toombs, Esq. is hereby GRANTED leave to file a final application for payment, as an administrative expense of Debtors' Estate, of compensation for legal services rendered and reimbursement of expenses incurred on behalf of Debtor in Possession with respect to the period from August 16, 1987 to the

date of the termination of such counsel's involvement in this proceeding pursuant to the terms of this Order, including compensation for legal services to be rendered in connection with the transition to any new counsel retained by Debtors in Possession or to a Trustee appointed by the Court.

Dated: November 19, 1987.

/s/ Geo. Bason, Jr.
George Francis Bason, Jr.
United States Bankruptcy Judge

90-1217

(3)

FILED
JAN 28 1991
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1990

Shirley M. Kearing,
Petitioner,

v.

The Honorable S. Martin Teel, Jr., et al,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
For the District of Columbia

APPENDIX B
APPEALS COURT

Shirley M. Kearing, Pro Se
For the Petitioner
4200 Cathedral Avenue, N.W.
Washington, D.C. 20016
(202) 244-6198

FILED SEPTEMBER 17, 1990

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

SHIRLEY M. KEARING, Appellant	)	
v.	)	No. 90-5062
	)	C. A. No. 89-02837
S. MARTIN TEEL, JR., U. S.Bankruptcy Court, et al. Appellees	)	

PETITION FOR REHEARING
AND
SUGGESTION FOR EN BANC CONSIDERATION

This appeal emanates from Appellant's allegations of illegal arrest and incarceration pursuant to a contempt order of the bankruptcy court for the District of Columbia. The bankruptcy court (Teel, J.) found Appellant in contempt of court after ordering her to comply with an appointed, but as of yet unqualified, trustee's motion to compel her cooperation. She refused not only to recognize the legality of that so-called trustee (thus his standing in the

bankruptcy court), but she also refused to cooperate with him in her joint bankruptcy proceeding. [An appeal as to the legality of this so-called trustee is pending before this Court]. Utilizing Rule 9020 of the Rules of Bankruptcy Procedure, the bankruptcy court instructed Appellant to surrender herself to the United States Marshall or face arrest. The bankruptcy court extended Appellant's time to file objections to this contempt order to October 24, 1988; however, on October 14, 1988, at 3:15 p.m. the United States Marshals arrested Appellant.

Appellant filed a complaint for damages (illegal arrest) against the bankruptcy judge and his clerk, the United States Trustee and his assistant, the so-called trustee, his attorney and his attorney's law firm with jurisdiction pursuant to the

United States Constitution, Amendment V, and 42 U. S. C. 1983. An amended complaint later added the United States Marshal and three of his deputies.

Appellant's amended complaint alleges that all Appellees

> ..."under color of law" ... through malfeasance, misfeasance and nonfeasance of duty, did cause a tortious act by violating plaintiff's guaranteed fundamental protection of due process of law by consummating an illegal arrest and incarceration of the above-named plaintiff in blatant and malicious use of process in direct violation of the Constitution of the United States."

The District Court held that the Appellant's amended complaint failed to state a claim upon which relief may be granted pursuant to 12(b)(6) of the Federal Rules of Civil Procedure. The court also held that the plaintiff had failed to state a constitutional tort claim. Mem. Op., at 3. Specifically, the court concluded that

no claim existed under 42 U. S. C. 1983 because the amended complaint failed to allege any action by any person under color of state law. The District Court also found the amended complaint failed to state a Bivens claim against any of the federal appellees or against the non-federal defendants. The court held that the so-called trustee took actions as trustee [a presumption that a legitimately appointed and qualified trustee was in place], a party to litigation that led to the contempt order against the plaintiff; therefore, "[t]his was not conduct under color of law and thus not a due process violation." And, the court continued on in a footnote:

> A suit against a bankruptcy trustee for quasi-judicial actions, as opposed to actions undertaken as a party to litigation, would be subject to dismissal on immunity grounds. See Mullis v. U. S. Bankruptcy Court for the District of Nevada, 828 F.2d 1385 (9th Cir.

1987).

The district court dismissed the claim against the United States Trustee and his assistant for failure to meet the "heightened pleading" standard for a Bivens action. Id., at 5. Moreover, the court held that the bankruptcy judge was entitled to absolute immunity under Bradley v. Fisher, 80 U. S. 335 (1871) and Stump v. Sparkman, 435 U. S. 349 (1978) since he was empowered to hold Appellant in contempt [whether it be civil or criminal or both has never been determined by anyone] under Bankruptcy Rule 9020 and therefore did not act in the clear absence of all jurisdiction. Id. The clerk of the bankruptcy court and the marshals were also held to have judicial immunity since their actions were closely associated with the judicial process. Nothwithstanding that, the marshals were entitled to at least

qualified immunity under Harlow v. Fitzgerald, 457 U. S. 800 (1982). Id., at 5-6.

The court continued that case law makes clear that the action must be dismissed "[i]f a plaintiff fails to allege direct evidence of unconstitutional intent and "... such intent must be pleaded with specific, discernible facts or offers of proof that constitutes direct as opposed to merely circumstantial evidence of intent." This reflects the district court's opinion in decisions of Whitacre v. Davey, 890 F.2d 1168, 1171 n. 4 (D.C. Cir. 1989) and Seigart v. Gilley, slip. op. at 9 (D.C. Cir. February 9, 1990) [Now cited as Seigart vs. Gilley, 895 F.2d 797 (D.C. Cir. 1990)].

Based on these findings, the District Court

dismissed this case with prejudice. This appeal followed.

Concise Statement of Issue and Its Importance

It is a sad day, indeed, in the annals of American jurisprudence when a court of appeals -- especially this Court of Appeals -- grants, with temerity, summary affirmance of a district court order denying the full protections afforded Appellant by the Constitution of the United States whilst knowing "... how deficient [this Court's] procedures are in granting motions for summary affirmance ...." United States v. Glover, 731 F.2d 41, 48 et seq. (1984).

No doubt, this appeal was first referred to a three-judge motions panel -- only two of whom physically meet, in camera, to review

motions once a week and where as many as ten or fifteen motions are decided in one or two hours. If the two attending judges have divergent opinions the papers are presented to the third "tie-breaker" judge.

It is an insult to this Appellant -- a law-abiding and taxpaying citizen -- that this Court, in making short shrift of this appeal with such cursory treatment, totally ignored a meritorious complaint and released an order such as this:

> The issue of whether the bankruptcy court has civil contempt powers has not been decided by this circuit. It is not necessary to resolve that issue here for appellant otherwise failed to state a claim against the appellees. The merits of the parties' positions are so clear as to justify summary action.

Nothing of the sort is "so clear."

> On summary judgment the inferences to be drawn from the underlying facts contained in such materials must be viewed in light most favorable to the party opposing the motion. Walker v.

Washington, 627 F.2d 541 (1980) cert. denied 449 US 994.

Just what does this Court think the Appellant is doing up in this Court anyway? Is it not that she was arrested and incarcerated upon actions initiated by a legally questionable individual, who, operating under the guise of being a duly appointed and legally qualified trustee convinced an Article I bankruptcy judge who knew (since, inter alia, the Appellant in open court, beforehand, advised him of such) that he did not have the power to arrest or incarcerate anyone for any reason yet did otherwise? See In Re Omega Equipment Corp., 51 B.R. 569 (Bkrtcy. DC DC 1985) which happens to be the controlling case law on this bankruptcy judge for this Circuit.

The per curiam opinion of this Court "cannot erase the fact that major aspects

of the normal appellate process are absent from this appeal." See United States v. Glover, 731 F.2d 41 (1984). For example:

(1) There was no oral argument. Id.;

(2) There is indication that this Court, once again, intends avoidance of either confirming or denying a lower court decision affirming Appellant's contention that all contempt powers of an Article I bankruptcy judge for the District of Columbia are nil and without those powers Appellant was, indeed, denied her "due process" rights ;

(3) There was no tradional collegiality of the decisional process normal to a multi-member appellate court. Id.;

(4) This appeal has not received the full attention of the court -- the attention it should have received ab initio; most significantly, once the motion for summary affirmance has been granted, the case has been decided on its merits. Id.

However, Appellant has clearly raised a viable claim for relief and that dismissal and summary affirmance was not, and is not, warranted. Since this Court "is a public business," Appellant believes her appeal

goes to the essence of the appellate process and requires a "public airing."

To begin with, Harlow v. Fitzgerald, 457 U. S. 800, 818, as a first step in considering a defendant's liability, instructed the trial judge to determine "whether [currently applicable] law was clearly established at the time an action occurred. This was never done. The District Court was correct in that it must not dismiss the complaint unless the plaintiff can prove no set of facts which would entitle her to relief. See Conley v. Gibson, 355 U. S. 41 (1957). Yet this Court and the lower court totally ignored the "standard" presented in Haines v. Kerner, 404 U. S. 519 (1972), that it does not appear "beyond doubt that [Appellant] can prove no set of facts in support of her claim which would entitle [her] to relief." Crisafi v. Holland, 655

F.2d 1305, 1309 (1981).

Pleadings are intended to serve as a means of arriving at fair and just settlements of controversies between litigants. They should not raise barriers which prevent achievement of that end. Maty v. Grasselli Co., 303 U. S. 197 (1938).

As Justice Black so aptly stated in Conley v. Gibson,

355 U. S. 41, 47:

> The decisive answer to this is that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is "a short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. The illustrative forms appended to the Rules plainly demonstrate this. Such simplified "notice pleading" is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly

> the disputed facts and issues. Following the simple guide of Rule 8(f) that "all pleadings shall be so construed as to do substantial justice," we have no doubt that petitioners' complaint adequately set forth a claim and gave the respondents fair notice of its basis. The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.

Too, "[p]roper pleading is important, but its importance consists in its effectiveness as a means to accomplish the end of a just judgment. Maty v. Grasselli Co., 303 U. S. 197 (1938).

"[The] district court dismissed ... complaint on the ground that it did not state a claim for which relief could be granted. This is a dubious practice ...." Dewey v. University of New Hampshire, 694 F.2d 1, 3 (1982).

In dismissing the Appellant's complaint,

the district court also stated that the Appellant had not complied with the "heightened pleading" standard. Yet, even though the district court might be forgiven:

> Dismissal of a claim requires the most close analysis by an appellate court, balancing the overall liberal thrust of the simplified civil rules on the one hand, see generally 5 Wright & Miller, Federal Practice and Procedure, Sections 1216, 1357, against the repeated demands by ... courts that there be more than conclusory allegations, even in civil rights cases. Dewey v. University of New Hampshire, 694 F.2d 1, 3 (1982).

> Therefore, although we must ask whether the "claim" put forward in the complaint is capable of being supported by **any conceivable set of facts**, we insist that the claim at least set for **minimal facts**, not subjective characterizations, **as to who did what to whom and why**. [Emphasis added]. See Dewey v. University of New Hampshire, 694 F.2d 1, 3 (1982).

This demand, however, as set out in a dissenting opinion in Siegert v. Gilley, 895 F.2d 797, 806-807 (D.C. Cir. 1990), should give pause:

> It is worth remembering that our heightened pleading standard has not as yet even been explicitly approved by the Supreme Court.

And finally, even if the arrest and incarceration of the Appellant was, as Appellees have stated, inadvertent:

> ... judges are not absolutely immune from liability and damages for administrative, legislative, or executive functions that judges may occasionally be assigned by law to perform; it is nature of function performed --adjudication --rather than identity of actor who performed it -- judge -- that determines whether absolute immunity attaches to act. Forrester v. White, 108 S.Ct. 538 (1988)

WHEREFORE, Appellant prays this Honorable Court grant this petition for rehearing and accept her suggestion for *en banc* consideration for without such an opportunity, Appellant will have been denied any vindication of her constitutional rights.

Respectfully submitted,

/s/ Shirley M. Kearing
SHIRLEY M. KEARING, Appellant

FILED AUGUST 7, 1990

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

Leon R. and Shirley M. Kearing Appellants	)	
v.	)	Civil Action Number 90-7098
John W. Guinee, Jr. Appellant [sic])	)	

MOTION TO DISMISS APPEAL OR IN THE ALTERNATIVE FOR SUMMARY AFFIRMANCE

Appellee, John W. Guinee, Jr. ("Guinee" or the "Trustee"), the trustee in the Chapter 11 bankruptcy case of appellants, Leon R. and Shirley M. Kearing (the "Debtors"), respectfully moves, pursuant to Rule 27 of the Federal Rules of Appellate Procedure, for dismissal of this appeal, or in the alternative, for summary affirmance of the District Court's June 4, 1990 order. As grounds for this motion, appellee states as follows:

I. Procedural History

On December 10, 1986, appellants filed a voluntary petition under Chapter 11 of the United States Bankruptcy Code, 11 U.S.C., in the Bankruptcy Court for the District of Columbia (Case Number 86-00913). Because the Debtors, as debtors-in-possession, were unable to formulate a successful plan of reorganize [sic] or to otherwise administer the estate, Guinee was appointed Chapter 11 Trustee on December 15, 1987. Throughout the bankruptcy proceeding, the Debtors have failed, and Shirley Kearing has fervidly refused, to cooperate with the Trustee in his efforts to administer property of the estate. Since the appointment of the Trustee, the Debtors, for the most part, have not been represented by counsel. In their efforts to frustrate the Trustee in resolving the bankruptcy case, the Debtors have initiated no less than nine separate

proceedings in the District Court and the Court of Appeals, consisting of various appeals from orders of the Bankruptcy Court, petitions for writs of mandamus, a separate actions for damages against various parties and participants in the bankruptcy proceeding. In these proceedings, the Debtors have repeatedly alleged that the Bankruptcy Court, the U. Trustee, the appointed Trustee, counsel f the Trustee, and their former counsel hav acted without authority in their bankrupt proceeding. The rulings issued in these proceedings have established that the Debtors' allegations are without merit.

This most recent appeal relates to the sale of the Debtors' former residence located at 4801 Van Ness Street, Washington, D.C. (the "Van Ness property" and the contempt proceedings against the Debtors resulting from their obstruction

the Trustee's efforts to sell the property.

Subsequent to his appointment, the Trustee attempted to obtain certain financial information from the Debtors and to obtain access to the Van Ness property. As a result of the Debtors' refusal to cooperate with the Trustee, the Bankruptcy Court issued on April 23, 1988, upon the Trustee's motion, an order directing the Debtors to provide financial information to the Trustee and to cooperate with the Trustee in his efforts to obtain offers for the purchase of the Van Ness property and in every other effort which he undertook in the fulfillment of his statutory duties. A copy of the April 23, 1988 order is attached hereto as Exhibit A.

The Debtors failed to comply with the order compelling their cooperation, and the Trustee filed a motion for an order requiring the Debtors to show cause why

they should not be held in contempt. The Bankruptcy Court issued an order, on September 30, 1988, holding Shirley Kearing in civil contempt ("First Contempt order"). The First Contempt order is attached hereto as Exhibit B. Leon Kearing was not held in contempt and was discharged from the Bankruptcy Court's order to show cause. The First contempt [sic] order was appealed to the District Court in connection with other matters, and on August 2, 1989, the District Court affirmed the Bankruptcy Court's contempt order. No appeal was taken from the District Court's order. Therefore, the basic ruling that the Debtors were to cooperate and could be held in contempt for failing to do so is the law of the case and was not challenged by the Debtors in further appeals.

A second motion for a show cause order was filed by the Trustee following Leon

Kearing's continued failure to comply with the original order compelling cooperation and Shirley Kearing's further acts of contempt of that order. This second show cause motion was transferred to the District Court upon the request of the Bankruptcy Judge for a partial withdrawal of reference pursuant to District Court Local Rule 602(a). After a hearing, the District Court entered an order on October 31, 1989 finding the Debtors in contempt of the Bankruptcy Court's order compelling their cooperation with the Trustee and prohibiting them from taking any action to interfere with the Trustee's efforts to sell the Van Ness property ("Second Contempt order"). A copy of the Second Contempt order is attached hereto as Exhibit C. The Second Contempt order also provided that if the Debtors failed to cooperate with the Trustee, upon the

Affidavit of the Trustee reflecting such non-cooperation, the Debtors would be arrested and incarcerated until they demonstrated a plan of cooperation completely satisfactory to the Court. The October 31, 1989 contempt order was consented to by the Debtors and was not appealed.

Thereafter, the Trustee obtained purchasers for the Van Ness property. After notice of the proposed sale was served on the Debtors and other parties in interest, Shirley Kearing threatened to obstruct the sale. Pursuant to the Second Contempt order, the Trustee filed a motion for issuance of an order of incarceration. Shirley Kearing appeared at the hearing on the motion, represented by counsel, and signed the order which is the subject of this appeal, acknowledging that she understocd the order. The June 4, 1990

order, in effectuating the Second Contempt order, prohibits the Debtors from, inter alia, taking any action, or causing any other person to take any action, of any kind to interfere with the Trustee's efforts to sell the Van Ness property, and prohibits them from going within 100 yards of the property. A copy of the June 4, 1990 order is attached hereto as Exhibit D. The June 4, 1990 order further states that if either of the Debtors violates either the order or the October 31, 1989 contempt order, he or she shall be arrested and incarcerated, upon the affidavit of the Trustee.

II. Motion to Dismiss Appeal

The District Court's June 4, 1990 Order, which is the subject of this appeal, is an interlocutory order implementing a previous Order, the Second Contempt order entered on

October 31, 1986 [sic] and never appealed. As the Debtors have filed this appeal without obtaining leave to appeal pursuant to Rule 5 of the Federal Rules of Appellate Procedure, the appeal should be dismissed.

In the Second Contempt order, the District Court found the Debtors in civil contempt for their repeated interference with the Trustee's legitimate endeavors to resolve their bankruptcy. As a consequence, the District Court's Second Contempt order prohibited them from continuing to interfere with the Trustee's efforts to sell the Van Ness property. Upon the Debtors' continued failure to comply with the Second Contempt order, the June 4, 1990 order was issued for the purpose of clarifying and effectuating the Second Contempt order. The June 4, 1990 order does not finally determine any aspect of the bankruptcy case, but merely decides

an intervening matter relating to the sale of property of the estate. See Collier on Bankruptcy, ¶ 3.03 (15th ed. 1990); Matter of Xonics, Inc., 813 F.2d 127, 130 (7th Cir. 1987) (holding that a judge's refusal to hold a party in civil contempt is not an appealable final order). A final judgment is one which disposes of the whole subject matter, gives all the relief that was contemplated, and leaves nothing to be done to adjudicate the cause on the merits. Id. (citing Catlin v. United States, 324 U.S. 229 (1945); City of Louisa v. Leiu, 140 F.2d 512, 514 (6th Cir. 1944). The June 4, 1990 order was not dispositive of the whole merits of the cause, but only addressed the intervening matter of the Debtors' contempt with respect to the Trustee's efforts to sell the property. The actual subject matter of the proceeding, the motion on the sale of the Van Ness property, was still

pending before the Bankruptcy Court at the time the June 4, 1990 order was entered.

Further, the June 4, 1990 order was not a separate injunctive order, but an order entered to clarify and effectuate the Second Contempt order. It did not involve any subject matter not addressed in the Second Contempt order. The Debtors did not seek to appeal the Second Contempt order, and the time for appealing that order has since long passed.

However, even if the June 4, 1990 order were construed as a separate contempt order, it is still not appealable as of right. A civil contempt order is interlocutory and, as to a party to the litigation, an appeal is not available until there is a final judgement in the entire action. Wright & Miller, Federal Practice and Procedure [sic]: Civil § 2960 at 592 (citing [sic] Fox v. Capital Co.,

299 U.S. 105 (1936); Duell v. Duell, 178 F.2d 683 (D.C. Cir. 1949). As the Debtors have failed to obtain leave to appeal the interlocutory order, or to demonstrate why an interlocutory appeal should be allowed, their appeal should be dismissed.

Finally, the Debtors' Statement of Issues does not allege any specific error on the part of the District Court in entering the June 4, 1990 order. The Debtors state as their issue on appeal:

> Is there a duly appointed an [sic] legally qualified trustee in this bankruptcy proceeding who has any standing to present any motion before any federal court for the District of Columbia -- indeed, in any court of law or equity?

This issue does not relate to the June 4, 1990 order, which deals with the October 31, 1989 order finding the Debtors in contempt.

III. Motion for Summary Affirmance

Alternatively, appellee moves for summary affirmance of the District Court's order on the grounds set forth above in support of appellee's motion to dismiss the appeal. The merits of this case "are so clear as to justify expedited action," see Walker v. Washington, 627 F.2d 541 (D.C. Cir.) (per curiam [sic]), cert. denied, 449 U.S. 994 (1980), and further briefing and argument are not necessary to a just disposition of this appeal, see United States v. Glover, 731 F.2d 41, 44 (D.C. Cir. 1984).

As stated above, the June 4, 1990 order is an interlocutory order entered by the District Court to effectuate the Second Contempt order and does not present any new, appealable issues. The Debtors' Statement of Issues neither alleges any specific error on the part of the District

Court in entering the June 4, 1990 order nor identifies any new issue presented by the June 4, 1990 order.

Further, the Debtors have brought the issue of the Trustee's authority to act in their bankruptcy case before the Bankruptcy Court, the District Court, and this Court of Appeals in numerous motions and appeals. It has been established repeatedly throughout this case that the actions taken by the Trustee in the discharge of his statutory duties have been, in all respects, appropriate, including his efforts to obtain the cooperation of the Debtors.

The order which is the subject of the Debtors' notice of appeal was signed by Shirley Kearing at the hearing before the District Court, as an acknowledgement that she understood the order. She was represented by counsel at the hearing on

the Trustee's motion, and signed the order voluntarily.

WHEREFORE, appellee respectfully moves for entry of an order dismissing this appeal as interlocutory or, in the alternative, for an order summarily affirming the District Court's June 4, 1990 order.

Dated: August 7th, 1990

Respectfully submitted,

/s/ Peter R. Kolker

Peter R. Kolker, Esquire #25478
ZUCKERMAN, SPAEDER, GOLDSTEIN,
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FILED AUGUST 7, 1990

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

In Re:	)	
Leon R. and	)	
Shirley M. Kearing	)	
Appellants, Pro Se	)	
	)	
v.	)	No. 90-7098
	)	
John W. Guinee, Jr.	)	
	)	

EMERGENCY MOTION FOR RECONSIDERATION
FOR A STAY OF ALL JUDGMENTS, ORDERS, DECREES
AND FOR OTHER RELIEF PENDING APPEAL

COMES NOW, Leon R. and Shirley M. Kearing, as Movants and Appellants, pro se (referred to hereinafter as "the Kearings"), and move that this Honorable Court issue the granting of an emergency motion for a stay of ALL judgments, orders, decrees; for ANY further participation in the Bankruptcy Court and/or the District Court for the District of Columbia

pertaining to the Kearing's bankruptcy proceeding or any and/or all other proceedings emanating from that bankruptcy proceeding; and for other relief from John W. Guinee, Jr., 1514 Inlet Court, Reston, Virginia, Attorney Peter R. Kolker and/or all attorneys and any and/or all other employees of the law firm of Zuckerman, Spaeder, Goldstein, Taylor & Kolker, 1201 Connecticut Avenue, N. W., Washington, D. C. (or at any other office under their direct control and supervision), the Clerk of the United States Bankruptcy Court for the District of Columbia, the United States Bankruptcy Judge for the District of Columbia, the District Court for the District of Columbia, the United States Trustee for the District of Columbia, the assistant United States Trustee for the District of Columbia and the United States Marshals for the District of Columbia

during the pendency of ALL the Kearing's appeals in this Court and until the entry of a final judicial determination of the appropriateness of such judgments, orders and decrees of the United States Bankruptcy Court and District Court for the District of Columbia entered in this Chapter 11 proceeding.

Final judicial determination shall mean a certified decree, a copy of an order of judgment which is binding and valid upon the Kearings from a court of competent jurisdiction of which no further appeals are permitted, or the time for appeal therefrom has expired.

As grounds in support of their emergency motion for reconsideration the Kearings state as follows:

1. This Honorable Court has jurisdiction over this emergency motion pursuant to the United States Constitution,

Amendment V; Rules 2, 8, 25, 27(c) and 47 of the Federal Rules of Appellate Procedure; Rule 7(h)(1)(a), (b), (c) and (2) of the General Rules of the United States Court of Appeals for the District o Columbia and 28 U.S.C. 1334(b).

2. On the original consideration of the Appellants motion for a stay of proceedings concerning the sale of their property located at 4801 Van Ness Street, N. W., Washington, D. C., this Court, on its own motion, to the extent of a June 20 1990, bankruptcy court order, dismissed fo lack of jurisdiction and on the Kearing's motion for stay of that order the Court dismissed their motion as moot.

The Court then proceeded to explain tha Courts of appeals do not have jurisdictio to consider direct appeals from bankruptcy court orders.

Continuing, this Court, on its own

motion, to the extent of a June 4, 1990, district court order, denied the Kearing's motion for a stay since the Kearings had neither first sought a stay from the district court nor explained their reason for not doing so; and, in any event, the Kearings had not demonstrated that they would incur irreparable harm absent a stay.

3. This is not what the Kearings intention had been in asking this Court for a stay; i.e., forget about the rulings, hone in on the participants involved in those rulings. Too, the Court remained mute to the Kearing's request for the Federal Bureau of Investigation to enter into this proceeding and, pursuant to 28 U.S.C. 586(a)(3)(F), root out the evil now permeating it.

What the Kearings did intend to do was to show this Court that since the presiding judge and clerk for the Bankruptcy Court

for the District of Columbia, the United States Trustee and the assistant United States Trustee for the District of Columbia, the appointed but as of yet unqualified trustee along with his counsel and his counsel's law firm involved in these proceedings had participated in, onc again, another sale of the Kearing's property and that all of them were Appellees in a case[s] now pending before this Court (all of which, incidentally, have wound their proverbial procedural way to legitimately reach this Court), that entire group of pettifoggers were "tainted and should be restrained from any action pertaining to this case and by asking for stay to prohibit these Appellees from any further chicanery, the Kearings reasoned that since this Court has jurisdiction ove the appeal[s] involving these Appellees, j well has the authority to stay any further

damage done to the Kearings by those Appellees' actions since all of them are parties to a pending decision by this Court and the Kearings have sought, more than a dozen times, stays in the lower courts.

4. The Kearings, on information and belief, maintain that the so-called trustee in this bankruptcy proceeding, along with the acquiescing parties named above, is currently "racing the clock" in order to immediately rid the Kearing estate of all tangible real and personal property and take all the proceeds for administrative expenses -- with legitimate creditors receiving no payment whatsoever -- thereby effectively rendering what should be a reorganization case into a no-asset case thus making any and/or all of the Kearing's appeals moot, whether in this Court or the District Court, since all of their assets will be gone.

And once that final piece of property i
sold [4801 Van Ness Street, N. W.,
Washington, D. C.] the so-called trustee i
at liberty to recommend conversion of this
case to a Chapter 7 Liquidation (whereby a
new trustee would be appointed and
strapped, along with the Kearings, with an
outrageous tax liability problem) and then
what will become the former so-called
trustee would be absolved of any and all
further responsibility. But, of course,
the Kearings will be left with a new
trustee and a new tax problem.

And all of this can be done, and
probably will be, albeit with unmitigated
gall while this so-called trustee has file
no plan of reorganization whatsoever in
over two years, has not paid one creditor
and all the while has attempted to wrap
himself in the robes of the Bankruptcy
Court while any protections which should b

afforded the Kearings has been totally lacking in this case due to non-feasance, misfeasance and malfeasance of those above-named individuals responsible for protecting those safeguards.

5. The Kearings are well aware that four relevant factors should be considered for the issuance of a stay pending appeal and believe that their current situation overwhelmingly comports with three of the criteria [the fourth, irreparable harm to others, appears to be minimal except to the pocketbook of some of the Appellees]:

(1) Likelihood of success on the merits in appeal;

The Kearings currently have pending in this Court three separate and distinct appeals that are directly related. The basic underlying question on all three is simple and succinct:

> Is there a duly appointed and legally qualified trustee in

this bankruptcy proceeding wh
has any standing to present
any motion before any federal
court for the District of
Columbia -- indeed, in any
court of law or equity?

First, the Kearings do not believe that they are, in fact, legally in bankruptc proceedings since the requirements of Section 322 of Pub.L. 99-353, July 10, 1984, Section 283(aa) of Pub.L. 99-554, October 27, 1986, F.R.Civ.P. 11 and Bankruptcy Rule 9011 were totally disregarded; however, if this Court doe find that the Kearings were swept up, indeed, illegally in bankruptcy proceedings, there is no need to go forward as the following becomes irrelevant. Conversely, if this Court finds that the Kearings are under the jurisdiction of the Bankruptcy Court fo the District of Columbia, then the Kearings believe that the following

grievous and callous errors, mistakes, and unadulterated insanity that has occurred in this case are most pertinent for the likelihood of success in their appeal pending before this Court; to wit:

> The United States Trustee never complied with his duties, pursuant to 11 U.S.C. 1102(a)(1), by his failure to appoint a committee of unsecured creditors -- regardless of his lame excuse in not believing that any could or would serve; he never complied with his duties, pursuant to 28 U.S.C. 586(a)(3)(A), by failing to monitor or investigate applications for compensation and reimbursements allowed or applied for under 11 U.S.C. 326, 328, 329, 330, and Rule 2016 of the Rules of Bankruptcy Procedure; he never complied with his duties, pursuant to 28 U.S.C. 586(a)(3)(B), by failing to monitor any plan of reorganization and to ascertain why no disclosure statement was, or has been, ever filed when the Kearings, as debtors-in-possession, did file one; he never complied with his duties, pursuant to

28 U.S.C. 586(a)(3)(F), by h
failure to notify the
appropriate United States
Attorney of matters which
constitute a crime under the
laws of the United States;
and, he never complied with
his duties, pursuant to 28
U.S.C. 586(a)(3)(G), by
failing to monitor the
progress of this case and to
assure that all officers of
the Court are adhering to th
Code of Professional Conduct
as determined in In re Smith
5 B.R. 92 (Bkrtcy. D. DC
1982).

The Clerk of the Bankruptcy
Court for the District of
Columbia has failed miserabl
to perform his duties under
Rule 9011 and 2013 of the
Rules of Bankruptcy Procedur
-- even though the Kearings
have ask not only this Court
but the District Court also
issue a writ of mandamus to
force his performance.

The Kearings, as debtors-in-
possession, fully complied
with their fiduciary duties
this proceeding and could no
be removed as debtors-in-
possession since the
Bankruptcy Court sent no
notice and held no hearing a
required by 11 U.S.C. 1102,
received no testimony, enter
no evidence, neither analyze
nor weighed any cost/benefi

> or cost/protection for appointment of a trustee; yet, the Bankruptcy Court found "cause" even though there had been no fraud, dishonesty, incompetence or gross mismanagement on the part of the Kearings and that the expense and inconvenience of a trustee was, and is, an adverse factor to any successful reorganization of this bankruptcy proceeding.
>
> It is abominable that neither an examiner was appointed in this proceeding as requested under 11 U.S.C. 1104(b)(1) by the Kearings in an application for an expedited hearing for such an appointment nor was any notice or hearing forthcoming from that application.
>
> Regardless, the appointment of a trustee was totally inappropriate since no notice was given and no hearing on any motion for that appointment as mandated by 11 U.S.C. 1102 was held.

Also pending on appeal in this Court is an order of April 23, 1988, of the Bankruptcy Court "approving agreement in settlement of motions seeking relief from stay,

compromising mutual claims and authorizing trustee to execute deeds in lieu of foreclosure as to Unit 201, Unit 502 and Unit 504, 4444 Connecticut Avenue, Washington, D. C."

The Kearings maintain that this order - a transfer of property back to one of the creditors -- was not "interlocutory" but "final" under 28 U.S.C. 158(a) and the Kearings were not to be humiliated by having to ask permission of the District Court to appeal this loss of property in that:

> The findings of fact by the Bankruptcy Court were clearly erroneous under Rule 8013 of the Rules of Bankruptcy Procedure in dealing with thi transfer of property.
>
> Nowhere did the Appellee, in seeking relief from the automatic stay incurred in bankruptcy and in having this property transferred back, meet the two-prong burden of proof test under 11 U.S.C. 362(d)(2) and (g)(1) since th Kearings had, and have, equit

in the collateral and that collateral is necessary for an effective reorganization.

The Appellee also had adequate protection in that no relief should have been granted from the stay because:

(a) continuation of stay would not result in undue risk of material harm;
(b) a plan had been presented by the Kearings [no disclosure statement has ever been made] for a reasonable and possible reorganization;
(c) the property was needed for reorganization;
(d) there was equity in the property for benefit of debtor and the creditors.

The Appellee did not have any problem resulting from Article 9 of the Uniform Commercial Code because there is, and was, no risk that the property could be lost in cash proceeds being commingled -- assuming the Appellee, under Article 9-306 had a perfected security interest in any proceeds of the Kearings to begin with.

This transfer of property, under any stretch of the imagination, was not, and is not, a "core" proceeding but

is a proceeding "related to" this Title 11 case in the Bankruptcy Court; and this transfer definitely will not pass muster when tested against the criteria set fort in the United States Supreme Court decision in the Norther Pipeline case, which provides that when controversy arises out of state law, it may only be adjudicated with the federal system, by an Article III court; and Article I judges have no subject matter jurisdiction.

If nothing else, the Bankruptcy Judge, under 28 U.S.C. 157(b)(3), should have determined, on his own motion -- if nothing else -- whether this proceeding was a "core" proceeding under 28 U.S.C. 157; or was [read is] a "related" proceeding and coul be heard only as a "non-core, related proceeding, wherein proposed findings of fact and conclusions of law should hav been submitted to the Distric Court pursuant to 28 U.S.C. 157(c)(1)?

Too, if the Bankruptcy Judge had any reservations he should, either under 28 U.S.C 1334(c)(2) [mandatory abstention] or 28 U.S.C. 1334(c)(1) [voluntary abstention], have invoked one or the other in this transfer

of property.

And, finally, in this appeal an appointed, but unqualified trustee, whether "de facto" or not -- especially when contested by a party in interest, does not have the unmitigated right to transfer property under 11 U.S.C. 363 in this proceeding especially when the Appellee may not be protected by 11 U.S.C. 363(m) in that reversal or modification of an appeal of the sale or lease of property authorized under the Bankruptcy Code does not affect the validity of a sale under such authorization to an entity that purchased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization was stayed pending appeal even though the 9th Circuit Court of Appeals has "carved out a narrow exception to this rule, where real property is sold to a creditor who is a party to the appeal" and where "it would not be impossible for the Court to fashion some sort of relief"? See In re Sun m Valley Ranches, Inc., 823 F.2d 1373 (9th Cir. 1987) at page 1375, since Standard Federal found use of this cite to defend the "mootness" issue of this transfer but failed to

continue to the very next paragraph below their quote which then proceeds to state the "exception" ruling which noted "a narrow exception to this rule, where real proper is sold to a creditor who is party to the appeal" and whe "it would not be impossible for the Court to fashion som sort of relief".

In one of the other Kearing's appeals, Shirley M. Kearing was illegally arrested and incarcerated on a contempt order directly out of the Bankruptcy Court for the District of Columbia. And, to add insult to injury, she has been continuall harangued and harassed with having to appear at over ten (10) hearings concern that contempt; and this Court currently h her appeal from the District Court where she contends that the District Court for the District of Columbia erred in that it

Did not allow her to invoke the pro se protection found Haines v. Kerner, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed2d

652 (1972);

Found that she failed to state a "Bivens claim" (Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), even though her complaint alleged that the individuals named, ACTING ("under color of law") IN AN OFFICIAL CAPACITY, violated her due process rights; Stated that she failed to state a "claim" under Rule 12(b) of the Federal Rules of Procedure when, in fact, she defined the Appellees actions as "malfeasance, misfeasance and nonfeasance of duty" along with "blatant and malicious use of process" in denying Appellant's guaranteed fundamental protection of "due process";

Found that the United States Bankruptcy Judge for the District of Columbia has contempt powers under Rule 9020 of the Bankruptcy Rules of Procedure, notwithstanding the "Omega ruling" as found in In Re Omega, 51 B.R. 569 (D.C. 1985);

Assumed that there is a legally appointed and duly qualified trustee in this bankruptcy proceeding who has authority to present a motion for show cause for contempt

and seek sanctions by the Bankruptcy Court under Rule 9020 of the Bankruptcy Rule of Procedure and that trust and his attorneys are "quas judicial" officials;

Stated that her arrest and incarceration was due to negligence thereby avoiding constitutional tort claim under 42 U.S.C. Section 198

Found that the United State Trustee and the assistant United States Trustee were only involved in the appointment of the so-calle trustee; and, that it in an of itself "do[es] not amoun to a specific allegation of constitutional violation" w 11 U.S.C. 1104(c), 28 U.S.C Section 586(A),(B),(F) and (G), and In re Smith, 5 B.R 92 (Bkrtcy. D. DC 1982), proscribe otherwise;

Found that the she failed t state a Respondeat Superior claim against the United States Trustee and the Unit States Marshal in light of what

Haynesworth v Miller, 820 F.2d 1245 (DC Cir. 1987), a 1262 [13] and footnote 139, page 1263 said;
Found that she failed to me the "heightened pleading

standard" by alleging violation of "due process" under the Fifth Amendment of the Constitution of the United States leading to illegal arrest and incarceration -- that in and of itself being a "specific deprivation of her rights" that are "clearly established," when viewed in light of In Re Omega, supra, which prohibits, unequivocally, the very actions that all the Appellees undertook and then succeeded in accomplishing;

Contorted the use of Bradley v. Fisher, 80 U.S. 335 (1871) and Stump v. Sparkman, 435 U.S. 349, given the Supreme Court's explanation and example in Stump at p. 356-7 along with citing from Bradley, 13 Wall., at 352, protected the Appellees when the "Omega ruling" in the District of Columbia explicitly states that an Article I judge dealing with contempt in the District of Columbia wanders into pastures exclusively reserved for Article III adjudication; and, is an Article I judge in the District of Columbia absolutely immune" when he knew, **IN ADVANCE**, that there is a "clear absence of **ALL** jurisdiction" for contempt sanctions by him; and

Decided that the Clerk of t
Bankruptcy Court for the
District of Columbia and
United States Marshals for
District of Columbia were
under "mistaken belief" tha
they were carrying out a va
contempt order of the Unite
States Bankruptcy Court for
the District of Columbia by
causing her to be arrested
October 14, 1988, and there
they were protected by 28
U.S.C. Section 566(a) and
therefore "absolutely immun
even when taken in context
with Haynesworth, supra.

(2) Irreparable harm to those seeking stay;

When the Kearings first sought legal adv
and assistance about their financial
dilemma in 1986, their assets were
$1,166,327.66 including equity in five (
real estate properties.
Their total indebtedness was only
$977,961.47 -- roughly $265,000.00 less
than their assets -- a far cry from
insolvency in anybody's ledger.

Following the advice of what could on

be termed a "shyster lawyer" there has since been a willful and flagrant wasting of the assets of their estate tantamount to profligate improvidence by the insipid actions of the aforementioned appointed but unqualified trustee, John W. Guinee, Jr., his counsel and his counsel's law firm, the United States Trustee, the Assistant United States Trustee, Bankruptcy Judges and District Judges for the District of Columbia, wherein the Kearing's fortunes are now being disembogued of all their assets; and as of the date of the filing of this emergency motion, they are now on their way, lead by this appointed yet unqualified trustee, et al, to owing the Internal Revenue Service taxes hovering around the neighborhood of $800,000.00 and not one piece of property left.

(3) Ill-effect on the public interest

This entire proceeding has become such a "travesty of justice" that the chilling effect on bankruptcy practice throughout this country is in jeopardy if these gros irregularities are allowed to germinate, sprout and spread.

The bankruptcy process is a structured basically administrative, field governed constitutional and statutory law with definitive restrictions placed upon all t participants.

But this proceeding has become such a glaring example of "inside players making up the rules as they go along" that only the myopic would be remiss to encounter t utter contempt and disregard these "players" have had of the Kearing's right to "due process" under the law as guaranteed by Amendment V of the United States Constitution and all the other

myriad laws, procedures and protections that rightfully should be afforded them and others who haplessly wander into the quagmire of bankruptcy only to realize too late that the courts -- in the Kearings case particularly -- have refused commitment to "equal justice under law" which only reinforces the Kearing's belief that "[a] casual attitude toward human hurt and pain is the surest sign ... [of] the beginning of the end of a free society."

The Kearings truly believe that all of the prevalent factors they have set forth herein are most obvious for seeking this emergency motion for reconsideration for a stay and that the above should have shed more light on their plight.

WHEREFORE the Appellants pray this Court

to issue such a stay no later than this

7th day of August, 1990.

/s/ Shirley M. Kearing
SHIRLEY M. KEARING
Appellant, Pro Se

/s/ Leon R. Kearing
LEON R. KEARING
Appellant, Pro Se

FILED JULY 14, 1990
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

In Re:	)	
Leon R. and	)	
Shirley M. Kearing	)	File No.
Movants, Pro Se	)	
	)	
Debtors, Pro Se	)	Bankruptcy Case
	)	No. 86-00913
	)	(Chapter 11)
	)	
Appellants, Pro Se	)	District Court
	)	Appeal Case
	)	No. 88-1232 TPJ

ADDENDUM AND MEMORANDUM TO
EMERGENCY MOTION FOR A STAY OF ALL
JUDGMENTS, ORDERS, DECREES
AND FOR OTHER RELIEF PENDING APPEAL

COMES NOW, Leon R. and Shirley M. Kearing, as Debtors, Appellants and Movants, pro se (hereinafter referred to as "the Kearings"), and move that this Honorable Court issue the granting of the stay of ALL judgments, orders, decrees and for other relief as filed on July 3, 1989, no later than Friday, July 14, 1989.

The Kearings are well aware that four

relevant factors should be demonstrated for the issuance of a stay pending appeal and believe that they have complied in the:

(a) likelihood of success on the merits of their appeal;
(b) irreparable harm to them;
(c) no harm to any other party if stay is granted; and
(d) ill-effect on the public

interest by violation of their "due process" rights and refusal of the Clerk of the Bankruptcy Court to maintain records mandated to be kept.

The Kearings also believe that all of the prevalent factors are most obvious in their emergency petition and motion and that the following should shed more light on the emergency nature of this case.

Since the filing of the Kearings' original petition when the assets of their estate EXCEEDED their liabilities by approximately $265,000.00 as listed in the bankruptcy schedules [Assets of

$1,166,327.66 including equity in five (5) real estate properties and $977,961.47 in liabilities - a far cry from insolvency], there has been a willful and flagrant wasting of the assets of their estate tantamount to profligate improvidence by the aforementioned appointed trustee, John W. Guinee, Jr., the United States Trustee, Bankruptcy Judges and District Judges for the District of Columbia, wherein the estate of the Kearings has been disembogued of almost all of its assets; and as of the date of the filing of this motion, their estate now has incurred, through an appointed yet unqualified trustee, et al, non-dischargeable liabilities (taxes) hovering around the neighborhood of $800,000.00.

On information and belief, the so-called trustee is currently "racing the clock" to rebuild the Kearings' burned-out home so

that he may immediately put it on the real estate market, sell the property and take the proceeds for administrative expenses -- thereby rendering the Kearings' Chapter 11 case a no-asset case and effectively making any and/or all of their appeals moot.

Once this final piece of property is sold, the so-called trustee may then convert this case to a Chapter 7 (whereby a new trustee would be appointed and strapped, along with the Kearings, with the outrageous tax liability problem) and the current so-called trustee would be absolved of any and all further responsibility.

In addition, this so-called trustee has perjured himself with the City of Washington, D. C., by stating in an application for a permit needed to rebuild the Kearings' home that he is the legal owner of the Kearings' property; has engaged tradesmen, unlicensed in the City

of Washington, D. C., to hastily and shoddily rebuild without proper inspections; and, with unmitigated gall, has wrapped himself in the robes of the Bankruptcy Court by obtaining an order to keep the Kearings off of their own property.

The mortgagee of that property has more than adequate protection in that it has withdrawn any motion for "adequate protection."

We beg this Court to please stop this today.

Dated: July 14, 1989

/s/ Shirley M. Kearing
Shirley M. Kearing
Debtor-Appellant-Petitioner-Movant, Pro Se

/s/ Leon R. Kearing
Leon R. Kearing
Debtor-Appellant-Petitioner-Movant, Pro Se

JUNE 1, 1990

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SHIRLEY M. KEARING, Appellant,	)	
v.	)	No. 90-5062
	)	(C.A. No. 89-02837
THE HONORABLE S. MARTIN TEEL, JR., ET AL., Appellees.	)	

APPELLANT'S RESPONSE TO
MOTION TO DISMISS COMPLAINT

1. Defendants (1) John W. Guinee, Jr. ["Guinee"], (2) Peter R. Kolker ["Kolker"]; (3) Renee Franklin Hill ["Hill"]; and (4) Zuckerman, Spaeder, Goldstein, Taylor & Kolker ["Zuckerman, Spaeder"], by counsel, have moved, pursuant to Fed.R. Civ. P. 12(b)(6) to dismiss the complaint in this action, with prejudice.

2. These Defendants state that the Plaintiff sues upon her arrest by the United States Marshal PURSUANT TO A FACIALLY VALID ORDER OF THE UNITED STATES

BANKRUPTCY COURT [emphasis added]; thereby, no grounds exist for which plaintiff may be granted relief.

But the Supreme Court of the United States has been most enlightening in Stump v. Sparkman, 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978) concerning judicial immunity.

Undoubtedly, the Defendants, through counsel, through lack of advertence, misread that decision.

3. These Defendants, however, blatantly premise their motion for dismissal upon the erroneous and misconceived notion that the Bankruptcy Court of the District of Columbia has jurisdiction in matters of contempt.

4. But there is a "clear absence of jurisdiction" for the Bankruptcy Court for the District of Columbia to punish as expressed by the "Omega ruling" which does

not allow that Court to inflict such mulct. See In re Omega Equipment Corp., 51 B.R. 569 (Bkrtcy. DC DC 1985).

5. In that decision the District Court [Jackson, J.] aphorized:

> BANKRUPTCY JUDGES AT PRESENT CANNOT BE, AND HAVE NOT BEEN, ENDOWED WITH CONTEMPT POWER, BUT RATHER, IN MATTERS OF CONTEMPT ARE LIMITED TO THE SUBMISSION OF PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW TO THE PARENT FEDERAL DISTRICT COURT, WITH A FINAL ADJUDICATION OF CONTEMPT TO EMANATE, IF AT ALL, FROM THE DISTRICT JUDGE FOLLOWING DE NOVO REVIEW [emphasis added].

6. And if the specifics of that decision remain unclear to these defendants, then perhaps counsel for these defendants might peruse In Re Sequoia Auto Brokers Ltd, Inc. v. Idell, 827 F.2nd 1281 (9th Cir. 1987).

In this case, a bankruptcy court found Idell in civil contempt; the District Court reversed; and, then, the 9th Circuit Court vacated the district court's order and

remanded with directions to vacate the bankruptcy court's order for LACK OF JURISDICTION [emphasis added].

The 9th Circuit Court found that Article III of the United States Constitution "is the source of this inherent power to punish contempt" and "... bankruptcy courts do not derive their authority from article III..." in that:

> ... Congress created bankruptcy courts pursuant to its substantive authority over bankruptcies. U. S. Const. art I, Sec. 8, cl.4. Unlike an article III court, A BANKRUPTCY COURT HAS NO NECESSITY [emphasis added] to invoke an inherent contempt power to vindicate its authority ....

Be that as it may, the 9th Circuit then explored the possibility that "... bankruptcy judges have jurisdiction to exercise the contempt power only if they have a statutory basis for that authority."

The Court found "[t]here is no express statutory authority granting the contempt

power to bankruptcy judges."

So, the Court considered "... whether such power may be implied."

Argument in Sequoia had been made to the 9th Circuit to:

> ... assume that Congress granted bankruptcy judges civil contempt power, including the power to imprison, because there is no express language to the contrary.

The 9th Circuit's response is succinct:

> THIS WE WILL NOT DO [emphasis added]. If Congress had intended that bankruptcy judges should possess such power, it well knew how to confer it.

7. It is most interesting that the "Omega" ruling and the Sequoia decision by the 9th Circuit both comport explicitly and unequivocally in determining that bankruptcy judges DO NOT have either statutory or implied powers for contempt.

8. The foregone conclusion must then be that any bankruptcy judge who toys with contempt -- especially in the District

of Columbia or 9th Circuit -- does so in a "clear absence of ALL jurisdiction."

9. These Defendants also cite in their motion for dismissal the case of Mullis v United States Bankruptcy Court for the District of Nevada, 828 F.2d 1385 (9th Cir. 1987).

That decision merely stated that IF bankruptcy judges had absolute judicial immunity barring any act that was a "clear absence of all jurisdiction," it consequently followed that a trickle down effect would take place; i.e., that the clerk of the court and deputy clerks have quasi-judicial immunity when they perform tasks that are an integral part of the judicial process unless these acts were done in the "clear absence of all jurisdiction;" the trustee would also have absolute quasi-judicial immunity since he derives his immunity from the judge who

appointed him unless the trustee acts in the "clear absence of all jurisdiction."

10. The so-called trustee, "Guinee," one of the above defendants, is on even less solid ground than just a "clear absence of all jurisdiction."

Plaintiff has pending in the District of Columbia Court of Appeals the legality of this so-called trustee in that he failed to meet the requirements of 11 U.S.C. 1104 and 322; and, that he has NO STANDING whatsoever in ANY proceeding involving the Plaintiff.

11. The only remaining defense in this complaint would be either an "error" or an "act in excess of all jurisdiction" by the Bankruptcy Court for the District of Columbia. Neither is applicable to this complaint.

However, all through the myriad number of proceedings on Plaintiff's contempt

[eight (8) at last count], Plaintiff forewarned all who would listen and, undoubtedly, some who didn't that the Bankruptcy Court for the District of Columbia did not have ANY authority to punish -- only from the District Court could such sanctions emanate.

But to no avail.

Plaintiff was arrested and incarcerated on motion for contempt by defendants above; the United States Trustee and his assistant did nothing to prevent this abominable act; the bankruptcy judge found the Plaintiff in contempt and signed the order for the arrest and incarceration; the Clerk of the Bankruptcy Court delivered that order to the United States Marshal for execution; and the dirty deed was done.

All of the defendants knew that the bankruptcy court for the District of Columbia was acting with a "clear absence

of all jurisdiction" for contempt.

12. Defendants in this matter, lastly, clasp to Lonneker Farms, Inc. v. Klobucher, 804 F.2d 1096 (9th Cir. 1986) in that "this dispute arises out of a bankruptcy proceeding" and should, therefore, be resolved in the bankruptcy court.

Lonneker will not suffice, though, as Plaintiff's complaint deals with complicity in perpetrating a contempt action by a non-Article III judge in the "clear absence of All jurisdiction" with the chilling effect of violating one of Plaintiff's most basic of Constitutional rights -- denial of due process.

Respectively submitted,

/s/ Shirley M. Kearing
Shirley M. Kearing, Plaintiff

FILED JUNE 1, 1990

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SHIRLEY M. KEARING, Appellant,	)	
v.	)	No. 90-5062
	)	(C.A. No. 89-02837
THE HONORABLE S. MARTIN TEEL, JR., ET AL., Appellees.	)	

APPELLANT'S RESPONSE TO A COURT ORDER
OF MAY 11, 1990

1. The federal Appellees, S. Martin Teel, Jr., et al., and other Appellees (1) John W. Guinee, Jr. ["Guinee"], (2) Peter R. Kolker ["Kolker"]; (3) Renee Franklin Hill ["Hill"]; and (4) Zuckerman, Spaeder, Goldstein, Taylor & Kolker ["Zuckerman, Spaeder"], by counsel, have moved, pursuant to Rule 27 of the Federal Rules of Appellate Procedure and General Rule 7(i) for a summary affirmance of District Judge Gerhard A. Gesell's

February 13, 1990, order dismissing this action, with prejudice.

2. This Court, by order of May 11, 1990, required the Appellant (Shirley M. Kearing) to show cause, within twenty-one (21) days of the date of the order, why the motions should not be considered and decided without a response from her.

3. Appellant, through this document, responds to the arguments presented by both the federal Appellees and the other Appellees.

4. These Appellees state that the Appellant sues upon her arrest by the United States Marshal PURSUANT TO A FACIALLY VALID ORDER OF THE UNITED STATES BANKRUPTCY COURT [emphasis added]; thereby, no grounds exist for which Appellant may be granted relief.

But the Supreme Court of the United States has been most enlightening in Stump

v. Sparkman, 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978) concerning judicial immunity.

Undoubtedly, the Appellees, through counsel, through lack of advertence, misread that decision.

5. These Appellees, however, blatantly premise their motion for dismissal upon the erroneous and misconceived notion that the Bankruptcy Court of the District of Columbia has jurisdiction in matters of contempt.

6. But there is a "clear absence of jurisdiction" for the Bankruptcy Court for the District of Columbia to punish as expressed by the "Omega ruling" which does not allow that Court to inflict such mulct. See In re Omega Equipment Corp., 51 B.R. 569 (Bkrtcy. DC DC 1985).

7. In that decision the District Court [Jackson, J.] aphorized:

> BANKRUPTCY JUDGES AT PRESENT CANNOT BE, AND HAVE NOT BEEN, ENDOWED WITH CONTEMPT POWER, BUT RATHER, IN MATTERS OF CONTEMPT ARE LIMITED TO THE SUBMISSION OF PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW TO THE PARENT FEDERAL DISTRICT COURT, WITH A FINAL ADJUDICATION OF CONTEMPT TO EMANATE, IF AT ALL, FROM THE DISTRICT JUDGE FOLLOWING DE NOVO REVIEW [emphasis added].

8. And if the specifics of that decision remain unclear to these Appellees, then perhaps counsel for these Appellees might peruse In Re Sequoia Auto Brokers Ltd, Inc. v. Idell, 827 F.2nd 1281 (9th Cir. 1987).

In this case, a bankruptcy court found Idell in civil contempt; the District Court reversed; and, then, the 9th Circuit Court vacated the district court's order and remanded with directions to vacate the bankruptcy court's order for LACK OF JURISDICTION [emphasis added].

The 9th Circuit Court found that Article III of the United States Constitution "is

the source of this inherent power to punish contempt" and "... bankruptcy courts do not derive their authority from article III..." in that:

> ... Congress created bankruptcy courts pursuant to its substantive authority over bankruptcies. U. S. Const. art I, Sec. 8, cl.4. Unlike an article III court, A BANKRUPTCY COURT HAS NO NECESSITY [emphasis added] to invoke an inherent contempt power to vindicate its authority ....

Be that as it may, the 9th Circuit then explored the possibility that "... bankruptcy judges have jurisdiction to exercise the contempt power only if they have a statutory basis for that authority."

The Court found "[t]here is no express statutory authority granting the contempt power to bankruptcy judges."

So, the Court considered "... whether such power may be implied."

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> ... assume that Congress granted bankruptcy judges civil contempt power, including the power to imprison, because there is no express language to the contrary.

The 9th Circuit's response is succinct:

> THIS WE WILL NOT DO [emphasis added]. If Congress had intended that bankruptcy judges should possess such power, it well knew how to confer it.

9. It is most interesting that the "Omega" ruling and the Sequoia decision by the 9th Circuit both comport explicitly and unequivocally in determining that bankruptcy judges DO NOT have either statutory or implied powers for contempt.

10. The foregone conclusion must then be that any bankruptcy judge who toys with contempt -- especially in the District of Columbia or 9th Circuit -- does so in a "clear absence of ALL jurisdiction;" likewise, any other party who pursues such an undertaking while attempting to "wrap themselves within the judicial robes" of

this inferior court does so at his own peril.

11. These Appellees also cite in their motion for dismissal the case of Mullis v United States Bankruptcy Court for the District of Nevada, 828 F.2d 1385 (9th Cir. 1987).

That decision merely stated that IF bankruptcy judges had absolute judicial immunity barring any act that was a "clear absence of all jurisdiction," it consequently followed that a trickle down effect would take place; i.e., that the clerk of the court and deputy clerks have quasi-judicial immunity when they perform tasks that are an integral part of the judicial process unless these acts were done in the "clear absence of all jurisdiction;" the trustee would also have absolute quasi-judicial immunity since he derives his immunity from the judge who

appointed him unless the trustee acts in the "clear absence of all jurisdiction."

12. The so-called trustee, "Guinee," one of the above Appellees, is on even less solid ground than just a "clear absence of all jurisdiction."

Appellant has pending in the District of Columbia Court of Appeals the legality of this so-called trustee in that he failed to meet the requirements of 11 U.S.C. 1104 and 322; and, that he has NO STANDING whatsoever in ANY proceeding involving the Appellant.

13. The only remaining defense in this complaint would be either an "error" or an "act in excess of all jurisdiction" by the Bankruptcy Court for the District of Columbia. Neither is applicable to this complaint.

However, all through the myriad number of proceedings on Appellant's contempt

[eight (8) at last count], Appellant forewarned all who would listen and, undoubtedly, some who didn't that the Bankruptcy Court for the District of Columbia did not have ANY authority to punish -- only from the District Court could such sanctions emanate.

But to no avail.

Appellant was arrested and incarcerated on motion for contempt by Appellees above; the United States Trustee and his assistant did nothing to prevent this abominable act; the bankruptcy judge found the Appellant in contempt and signed the order for the arrest and incarceration; the Clerk of the Bankruptcy Court delivered that order to the United States Marshal for execution; and the dirty deed was done.

All of the Appellees knew that the bankruptcy court for the District of Columbia was acting with a "clear absence

of all jurisdiction" for contempt.

14. Appellees in this matter, lastly, clasp to Lonneker Farms, Inc. v. Klobucher, 804 F.2d 1096 (9th Cir. 1986) in that "this dispute arises out of a bankruptcy proceeding" and should, therefore, be resolved in the bankruptcy court.

Lonneker will not suffice, though, as Appellant's complaint deals with complicity in perpetrating a contempt action by a non-Article III judge in the "clear absence of All jurisdiction" with the chilling effect of violating one of Appellant's most basic of Constitutional rights -- denial of due process.

Respectively submitted,
/s/ Shirley M. Kearing
Shirley M. Kearing, Appellant

FILED APRIL 26, 1990

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SHIRLEY M. KEARING Appellant,	)	
v.	)	No. 90-5062
	)	(C.A. No. 89-2837
THE HONORABLE S. MARTIN TEEL JR., et al., Appellees.	)	

MOTION FOR SUMMARY AFFIRMANCE

Appellees John W. Guinee, Jr., a bankruptcy trustee, and his counsel, Peter R. Kolker, Renee Franklin Hill, and Zuckerman, Spaeder, Goldstein, Taylor & Kolker, respectfully move, pursuant to Rule 27 of the Federal Rules of Appellate Procedure and General Rule 7(i), for summary affirmance of District Judge Gerhard A. Gesell's February 13, 1990 order dismissing this action with prejudice (attached hereto as Exhibit A). The merits of this case "are so clear as to justify

expedited action," Walker v. Washington, 627 F.2d 541, 545 (D.C. Cir.) (per curiam), cert. denied, 449 U.S. 994 (1980), and further briefing and argument are not necessary to a just disposition of this appeal, United States v. Glover, 731 F.2d 41, 44 (D.C. Cir. 1984).

Statement of the Case

This action for $34 million arises out of appellant's arrest and incarceration (of less than one hour) by federal marshals acting pursuant to a facially valid court order. In 1986, appellant and her husband, Dr. Leon Kearing, filed a voluntary petition under Chapter 11 of the Bankruptcy Code, but as debtors-in-possession were unable to formulate a successful plan of reorganization or otherwise dispose of the bankruptcy. Accordingly, on December 15, 1987, United States Bankruptcy Judge S. Martin Teel, Jr. appointed appellee Guinee

as Trustee of the Kearings' bankruptcy estate and thereafter approved the appointment of appellees Kolker, Hill and Zuckerman, Spaeder as counsel for the Trustee.

In discharge of his duties as Trustee, Guinee sought to enlist the cooperation of the debtors in the administration of the bankruptcy estate. When that cooperation was not forthcoming, the Trustee filed a motion seeking, and the Bankruptcy Court granted, an order directing the debtors to assist the Trustee by providing him certain financial information and by not impeding his efforts to sell the debtors' residence on Van Ness Street, N.W. The Kearings did not comply, however, and on May 19, 1988 the Trustee, through his counsel, filed a motion for an order requiring the debtors to show cause why they should not be held in contempt. The Bankruptcy Court granted

this motion, and following a hearing on September 20, 1988 held the appellant in civil contempt, issuing a contempt order on September 30, 1988.

The contempt order required appellant to surrender to the United States Marshal within ten days of service of the Order or be arrested and incarcerated until she cooperated with the Trustee. In an order signed October 14, 1988 but not served by the Clerk until it was mailed to the parties on October 17, 1988, Judge Teel extended appellant's time to file objections to the Contempt Order until October 24, 2988. The U.S. Marshal, unaware that appellant's time to file objections had been extended by Judge Teel (because the contempt order had not been mailed) and acting pursuant to the contempt order, arrested Mrs. Kearing on October 14, 1988. Thereafter, Mrs. Kearing was

incarcerated for a period of less than one hour, whereupon Judge Teel, having been informed of appellant's detention, issued an order releasing her from custody.

The contempt order was eventually appealed to the District Court in connection with other matters, and on August 2, 1989 District Judge Jackson dismissed Mrs. Kearing's appeal in that proceeding. Nevertheless, appellant adhered to her strict refusal to cooperate with the Trustee, and on October 3, 1989 a second motion for a show cause order was filed by the Trustee through his counsel. Appellant filed this pro se action on October 16, 1989 -- more than a year following her arrest on the initial contempt citation and about ten days after the initiation of the second contempt

proceeding.[1]

In her amended complaint, a copy of which is attached hereto as Exhibit B, appellant alleged that appellees, "through malfeasance, misfeasance and nonfeasance of duty," caused "a tortious act" and violated appellant's due process rights by "consummating an illegal arrest and incarceration." As the District Court stated below, however, appellant's complaint failed to "explain how the

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[1] The second contempt proceeding was transferred to the District Court, Misc. No. 89-224. On October 6, 1989, a preliminary hearing was held on the matter, and on October 31, 1989 a second contempt order was entered against the Kearings. As the federal appellees have noted in their motion for summary affirmance of Judge Gesell's order (at footnote 1), "[i]t is a fair inference that appellant filed this action to harass the ... appellees shortly after she learned of a second contempt order (and more than a year after the original contempt order)." Under such circumstances, this appeal should not be permitted to absorb judicial resources or to distract the litigants from other matters.

various defendants were involved in the [alleged] due process violation." Mem. Op. at 2.

The District Court dismissed appellant's amended complaint for failure to state a claim upon which relief may be granted, concluding (1) that appellant's amended complaint, to the extent it alleged negligent conduct by appellees, did not set forth a constitutional violation, Mem. Op. at 3 ("[a]rrest or imprisonment resulting from negligence does not amount to a constitutional tort") (citing Baker v. McCollan, 443 U.S. 137 (1979), and (2) that even if construed as alleging deliberate misconduct on the part of appellees, appellant's amended complaint failed to state a claim under either 42 U.S.C. § 1983 or Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971). Id.

Legal Argument

For the reasons set forth in Judge Gesell's opinion, and for others not addressed by the District Court, this Court should summarily affirm the judgment below.

First, as the District Court acknowledged, Mem. Op. at 3, to the extent appellant purports to state a constitutional due process claim based on appellees' negligence in causing or contributing to appellant's arrest and incarceration, that claim must necessarily fail because appellant concededly was arrested pursuant to a facially valid court order. The Supreme Court has held specifically that no constitutional claim arises from arrest and subsequent incarceration pursuant to a facially valid court order. Baker v. McCollan, 443 U.S. 137 (1979) (arrest and eight-day imprisonment of wrong person not actionable

under 42 U.S.C. § 1983); see also Sami v. United States, 617 F.2d 755, 773 (D.C. Cir. 1979) ("it takes more than a false arrest or malicious prosecution claim to rise to the dignity of a constitutional violation, despite the loss of liberty that may be involved"); Simons v. Clemons, 752 F.2d 1053, 1055 (5th Cir. 1985). There can be no "deprivation" of constitutional rights within the meaning of the Due Process Clause where the challenged conduct is merely negligent. Daniels v. Williams, 474 U.S. 327 (1986).

Second, even if appellant's amended complaint could be construed as alleging deliberate misconduct by appellees,[2] the District Court was correct in concluding

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[2] Although appellant has alleged "malfeasance, misfeasance and nonfeasance of duty" on the part of appellees, the amended complaint contains no allegation of knowing, intentional, deliberate, malicious or conspiratorial conduct by any party.

that such an allegation would not be sufficient to state a claim under 42 U.S.C. § 1983. Appellant complains of an arrest executed by federal marshals acting pursuant to the order of a federal judge presiding over a federal bankruptcy proceeding. Appellant does not allege the act of any state actor, and actions under 42 U.S.C. § 1983 must plead the conduct of state -- not federal -- actors. See Daly-Murphy v. Winston, 837 F.2d 348 (9th Cir. 1987) ('Section 1983 provides a remedy only for deprivation of constitutional rights by a person acting under color of law of any state or territory or the District of Columbia"); McCord v. Bailey, 636 F.2d 606, 613 (D.C. Cir. 1980); cert. denied, 451 U.S. 983 (1981); Lonneker Farms, Inc. v. Klobucker, 804 F.2d 1096, 1097 (9th Cir. 1986).

Third, appellant fares no better with

respect to a Bivens claim, which she does not explicitly plead in her complaint. As noted by the District Court, Mem. Op. at 4, in filing a contempt motion against appellant, the Trustee and his counsel are not federal actors and cannot be said to have acted under color of law, an essential element of any Bivens claim. See Dennis v. Sparks, 449 U.S. 24, 27-28 (1980); United States v. Price, 383 U.S. 787, 794 (1966); Reuber v. United States, 750 F.2d 1039, 1054 (D.C. Cir. 1984). Mere participation by a party in litigation, without more, does not constitute state (or federal) action. Dennis, 449 U.S. at 28; see also Slotnick v. Garfinkle, 632 F.2d 163, 166 (1st Cir. 1980); Sykes v. California, 497 F.2d 197, 202 and n.3 (9th Cir. 1974).[3]

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[3] The Ninth Circuit's opinion in Sykes is particularly relevant to this case. The court rejected a plaintiff's argument that a trustee in bankruptcy had acted under color of law in initiating

Moreover, Guinee's status as a private actor for purposes of Bivens is shared by his counsel, appellees Kolker, Hill and Zuckerman, Spaeder. "[T]he conduct of an attorney acting in his professional capacity while representing his client" does not, standing along, "constitute action under color of law for purposes of [Bivens]." Donlan v. Smith, 662 F. Supp. 352, 360 (D. Md. 1986), aff'd without op., 826 F.2d 1219 (4th Cir. 1987); see also McCord v. Bailey, 636 F.2d 606, 613 (D.C.

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litigation against plaintiff in a related bankruptcy proceeding. 497 F.2d at 202. In so ruling, the court noted that "a private person who makes representations to a state official, even in a report required by law, is not acting 'under color of law' within the meaning of the Civil Rights Statutes." Id. at 202 n.3. Here, Guinee's contempt motion, besides being entirely consistent with his statutory duties, no more "imbued [Guinee] with the power and prestige of government officials," Reuber, 750 F.2d at 1054, than did his counterpart's action in Sykes. Rather, Guinee availed himself of a presumptively neutral procedure presided over by a presumptively neutral judge.

Cir. 1980) ("In their capacities as representatives of a client in court, private counsel do not act under color of state law"). Indeed, this rule obtains even where, as here, the attorney is appointed or approved by the court. Holsey v. Chandler, 598 F. Supp. 368, 370 (D.D.C. 1984) (citing Polk County v. Dodson, 454 U.S. 312 (1981). Thus, the District Court was correct in holding that none of the non-federal appellees acted under color of law for purposes of appellant's Bivens claim and, accordingly, that such claim should be dismissed as a matter of law.

Fourth, the District Court correctly held that appellant's Bivens claim was subject to dismissal for failure to meet the "heightened pleading standard" applicable to all Bivens actions. Mem. Op. at 4-5; see, e.g., Whiteacre v. Davey, 890 F.2d 1168, 1170-72 (D.C. Cir. 1989).

Appellant's amended complaint fails even to allege any specific act or omission of any particular appellee, much less set forth the detailed factual allegations necessary to state a claim of constitutional deprivation. Indeed:

> examination of the complaint ... reveals a series of broad conclusionary statements unsupported ... by specific allegations of fact. In addition, the individual defendants are nowhere referred to in the pleadings, other than in the title to the action, and there is, consequently, no way of determining which defendant, if any, is being charged with responsibility for a particular grievance.

Jackson v. Nelson, 405 F.2d 872, 873-74 (9th Cir. 1968) (affirming dismissal of pro se civil rights complaint).

Fifth, a bankruptcy trustee and his counsel, although not federal actors, are immune from civil liability for their conduct in connection with appellant's arrest and incarceration. Judges are absolutely immune from suits for damages

for acts performed in the discharge of their official duties, provided such acts are judicial in nature and not carried out "in the clear absence of all jurisdiction." Stump v. Sparkman, 435 U.S. 349, 356-57 (1978). This absolute immunity extends to persons whose duties and functions constitute an essential part of the judicial process, including bankruptcy trustees, e.g., New Alaska Development Corp. v. Guetschow, 869 F.2d 1298, 1302-03 (9th Cir. 1989); Lonneker Farms, Inc. v. Klobucher, 804 F.2d 1096, 1097 (9th Cir. 1986); Howard v. Leonard, 101 B.R. 421 (D. N.J. 1989); Wickstrom v. Ebert, 585 F. Supp. 924, 934 (E.D. Wis. 1984); see also Boullion v. McClanahan, 639 F.2d 213, 214 (5th Cir. 1981).[4] The immunity extends

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[4] Although it is unquestioned that a trustee has immunity "only if his actions are within the scope of the authority conferred upon him by statute or the court," In re Jacksen, 105 B.R. 542, 545

also to a trustee's counsel. Smallwood v. United States, 358 F. Supp. 398, 404 (E.D. Mo) ("the doctrine of judicial immunity also applies to defendant ... as court-approved attorney for the Trustee in

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(9th Cir. Bank. App. Panel 1989) (quoting In re Tucker Freight Lines, Inc., 62 B.R. 213, 217 (W.D. Mich. 1986), the District Court's suggestion (at footnote 1 of its opinion) that actions taken by a trustee as a party to litigation are not immunized from suit is not correct. Indeed, the case cited by the District Court in support of that proposition, Mullis v. United States Bankruptcy Court for the District of Nevada, 828 F.2d 1385 (9th Cir. 1987), cert. denied, 486 U.S. 1040 (1980), indicates that acts undertaken by a trustee in the contest of litigation are immunized from suit to the same extent as a trustee's other conduct on behalf of the estate. In Mullis, a debtor sued the trustee of his bankruptcy estate, alleging, among other things, that the trustee had violated his constitutional rights by filing a motion seeking the appointment of a guardian ad litem for the debtor and by communicating ex parte [sic] with the bankruptcy judge regarding the trustee's motion against the debtor for fees in connection with the trustee's deposition. Concluding that each of these acts was "within the ambit of the trustee's official duties," the court upheld the dismissal of the debtor's complaint on grounds of immunity. Id. at 1390-91.

Bankruptcy"), aff'd, 486 F.2d 1407 (8th Cir. 1973).[5] "A trustee will enjoy absolute immunity so long as he does not act in the clear absence of all jurisdiction or at least acts under the supervision of the bankruptcy judge." Howard v. Leonard, 101 B.R. 421, 423 (D. N.J. 1989) (citations omitted).

Here, (1) the trustee and his counsel were appointed pursuant to express statutory authority, (2) the acts undertaken by or on behalf of the trustee were at all times consistent with the trustee's statutory obligations and responsibilities, and (3) the order to arrest appellant for contempt -- the sole event from which this claim arises -- was a purely judicial act of Judge Teel.

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[5] It is not inconsistent to say that a bankruptcy trustee or his counsel have immunity derived from a judge's immunity and yet are not themselves federal actors for purposes of a Bivens analysis.

Nevertheless, appellant has contended below, and presumably will argue before this Court, that Judge Teel, allegedly lacking the statutory and/or constitutional power to hold appellant in contempt, acted "in the clear absence of all jurisdiction," thereby defeating his (and movants') defense of absolute immunity from suit for damages.

However, as the federal appellees have argued (at page 5 through 7 of their motion for summary affirmance), Judge Teel had subject matter jurisdiction over appellant's bankruptcy proceeding and was authorized by the 1987 amendments to Bankruptcy Rule 9020 to act precisely as he did in issuing the Contempt Order. Under such circumstances, it cannot reasonably be said that Judge Teel acted in the "clear absence of all jurisdiction." See, e.g., Stump v. Sparkman, 435 U.S. 349 (1978)

(judge who issued ex parte [sic] order to sterilize teenage girl immune from subsequent civil rights suit because act is not in clear absence of all jurisdiction merely because jurisdiction is exceeded or erroneous); O'Neil v. City of Lake Oswego, 642 F.2d 367 (9th Cir. 1981) (pro tem [sic] municipal judge acted in excess of jurisdiction, but not in its absence, when ordering contempt and incarceration despite absence of "the requisite papers to confer jurisdiction"); Ross v. Arnold, 575 F. Supp. 1494 (E.D. Wis. 1983) (family court commissioner erroneously ordered party in divorce proceeding to be jailed; held absolutely immune because he had subject matter jurisdiction in the underlying divorce proceeding and at most acted "in excess" of that jurisdiction). Whatever the niceties of a bankruptcy judge's jurisdiction may be, Judge Teel clearly had

jurisdiction over the subject matter of the proceedings before him, regardless of his power to issue a contempt order.

Conclusion

Inappropriate civil rights suits by bankruptcy debtors against those involved in pending bankruptcy proceedings are routinely dismissed. E.g., Mullis v. United States Bankruptcy Court for the District of Columbia, 828 F.2d 1385 (9th Cir. 1987); Lonneker Farms, Inc. v. Klobucher, 804 F.2d 1096 (9th Cir. 1986); see Slotnick v. Garfinkle, 632 F.2d 163 (1st Cir. 1980) (civil rights claim arising out of incarceration for contempt). As the Lonneker court noted in language equally applicable to appellant's action:

> This dispute arises out of a bankruptcy proceeding. The issues raised by [the debtor/plaintiff] should be resolved through such proceedings. It constitutes a waste of professional and judicial resources to divert such resources from the bankruptcy proceedings to a

> weak attempt to plead a claim under the civil rights statutes.

804 F.2d at 1097.

For these reasons, and for the reasons set forth above, this Court should summarily affirm the order of the District Court dismissing appellant's action with prejudice.

Respectfully submitted,

/s/ Michael R. Smith

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Dated: April 26, 1990

FILED APRIL 19, 1990

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SHIRLEY M. KEARING Plaintiff,	)	
v.	)	Civil Action No. 89-293-GAG
THE HONORABLE S. MARTIN TEEL JR., et al., Defendants	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS TEEL, BLOOM, EARLY, WATES, RUTHERFORD, NEELY, KERR, AND LINK TO DISMISS

Plaintiff has amended her complaint to name four persons from the U.S. Marshals Office for the District of Columbia: (1) Herbert M. Rutherford, III, (2) Joann Neely, (3) Victor Kerr and (3) [sic] Daniel Link (hereinafter "newly named defendants") as defendants in this action. Despite the fact that defendants motion to dismiss plaintiff's first complaint sets forth numerous procedural deficiencies in plaintiff's initial pleadings, plaintiff's amended complaint makes no effort to cure

any of these deficiencies. Instead, plaintiff has merely named additional defendants and requests more monetary damages.[6]

Therefore, for the reasons stated in defendants' original motion to dismiss and for the reasons stated below, this action should be dismissed with prejudice against all defendants represented by undersigned counsel.

ARGUMENT

I. THE AMENDED COMPLAINT FAILS TO SATISFY THE STANDARD OF A PLEADING APPLICABLE TO BIVENS CASES

Based on the principles articulated in defendant's original motion for summary judgment, the amended complaint should be dismissed against the newly named defendants because the plaintiff has (1) failed to effect service of process on the

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[6] This is a further indication that this action is merely designed to harass the federal officials named in this action

newly named defendants.[7] (2) incorrectly relies upon respondeat superior liability for defendant Rutherford[8], (3) failed to

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[7] Plaintiff's certificate of service to her amended complaint acknowledges that she sent the papers by mail and therefore failed to personally serve any of the defendants as required by Fed. R. Civ. P. 4(d)(1). It can hardly be claimed that plaintiff's status as a pro se litigant should have any bearing on her knowledge of the procedural requirements since defendant's original motion clearly set forth that plaintiff's obligation to personally serve a copy of the summons and complaint on each and every defendant. Thus, all claims against the newly named defendants must be dismissed for insufficiency of process and insufficiency of service of process. Fed. R. Civ. P. 12(b)(4), (5).

[8] The claim against defendant Herbert M. Rutherford, III, appears to be based exclusively on a respondeat superior theory. His only connection to this action is his position as the United States Marshal for the District of Columbia. Plaintiff has not claimed that he was in any way involved with the alleged "false arrest." Thus, for the reasons set forth in defendant's original motion, at 6, all of the constitutional tort claims against Rutherford should be dismissed for failure to states [sic] a claim upon which relief can be granted.

meet the heightened pleading standard[9], and (4) failed to state a Bivens claim.[10]

II. PLAINTIFF'S CLAIM AGAINST THE NEWLY NAMED DEFENDANTS IS BARRED BY ABSOLUTE JUDICIAL IMMUNITY

As the Supreme Court has observed, "few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction."

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[9] Despite the fact that defendants original motion sets forth plaintiffs obligation to state with particularity "who did what to whom and why," plaintiff's amended complaint fails to meet the heightened pleading requirement applicable to all Bivens actions. Thus, for the reasons specified in defendants' original motion, at 6-8, all claims against the newly named defendants should be dismissed for failure to meet the heightened pleading requirement.

[10] Plaintiff's amended complaint raises no new issues; it merely realleges a blanket assertion of "false arrest." Thus, once again plaintiff has failed to allege the requisite allegations of a Bivens action since the conduct complained of does not give rise to a constitutional deprivation. See, Defendants' Original Motion, at 8-9.

Pierson v. Ray, 386 U.S. 547, 553-554 (1967). By 1872, the doctrine of absolute judicial immunity for judicial officers was firmly entrenched in American law. See Bradley v. Fisher, 13 Wall. 335 (1872).

The Supreme Court has gone on to extend "absolute immunity to certain others who perform functions closely associated with the judicial process." Cleavinger v. Saxner 474 U.S. 193, 200 (1985). The same judicial immunity held by judges has been extended to other individuals who engage functions integrally related to the judicial process. See, e.g., Imbler v. Pachtman, 424 U.S. 409, 423-424 (1976) (prosecutors); Briscoe v. Lahue, 460 U.S. 32, 335 [sic] (1983) (police officers who testify as witnesses); Cok v. Consentino, 876 F.2d 1, 3 (1st Cir. 1985) (court-appointed guardians ad litem and conservators); Ashbrook v. Holliman, 617

F.2d 474, 477 (7th Cir. 1980) (court-appointed partition sales commissioners); Spaulding v. Nielson, 599 F.2d 728, 729 (5th Cir. 1979) (probation officers who file presentence reports); U.S. Steelworkers of America, AFL-CIO v.Bishop, 598 F.2d 408, 414 (5th Cir. 1979) (marshals who carry out magistrate's orders).

Thus, those who perform duties delegated by the judiciary "are entitled to the same judicial immunity as would be enjoyed by judicial officers performing the same act." Sparks v. Character and Fitness Committee of Kentucky, 818 F.2d 541,45 [sic] (6th Cir. 1987) vacated and remanded 108 S. Ct. 744 (1988), (remanded for reconsideration under Forrester v. White, 108 S. Ct. 538 (1988) affirmed on reconsideration, 859 F.2d 428 (1988) (affirming 818 F.2d 541), cert. denied, 109 S. Ct. 336 (1989). When a marshal carries out the order of a judge,

he is performing a function integrally related to the judicial process. As set forth in 28 U.S.C. § 566(a), "it is the primary role and mission of the United States Marshals Service to provide for the security and to obey [sic] execute, and enforce all orders of the United States District Court ..." [sic] When a marshal carries out a magistrate's order to take an individual into custody, "be it a writ or another form of a written or oral order, the marshal is acting in a purely ministerial role." U.S. v. Persigner, 562 F. Supp. 557, 561 (W.D. Pa. 1982) citing Levy Court of Washington Co. v. Ringgold, 30 U.S. 41 (1831).

Accordingly, the courts have consistently held that the marshals and their deputies have absolute immunity from personal liability suits challenging their compliance with the orders of judicial

officers. See e.g., Steelworkers, 598 F.2d at 414-415; Ross-Bey v. Two Unknown United States Marshals, No. H 87-402, Slip Op. (N.D. Indiana October 27, 1989), at 5-6; Stovall v. Hughs, 580 F. Supp. 97 (W.D. Oklahoma 1983); Martinez v. Winner, 771 F.2d 424 (1984) modified in part on other grounds, and rehearing denied in part, 778 F. 2d 553 (1985), vacated on other grounds, Tyus v. Martines 475 U.S. 1138 (1985); Zimmerman v. Spears 428 F. Supp. 759 (1976), affirmed, 655 F. 2d 310 (5th Cir. 1977). Because the Marshal is acting as a minister of the court, he is "[c]loaked with the absolute immunity of judges." Stovall, 58 F. Supp. at 99.

In this case, it is beyond genuine dispute that the deputies who arrested the plaintiff were acting pursuant to an order of Judge Teel. Judge Teel had full authority to issue the subject contempt

order under Bankruptcy Rule 9020, promulgated by the Supreme Court in 1987 pursuant to 28 U.S.C. § 207. Thus, the newly named defendants are entitled to the same judicial immunity as Judge Teel. See Steelworkers, 598 F.2d at 414-415; Spaulding, 599 F.2d at 729; Cok, 876 F.2d at 3; Sparks, 818 F.2d at 545; Ashbrook, 617 F.2d at 476; Ross-Bey, Slip Op., at 5-6; Stovall, 580 F. Supp. at 99.

III. NEWLY NAMED DEFENDANTS ARE ENTITLED TO QUALIFIED IMMUNITY

Assuming arguendo that the newly named defendants had exercised discretion in regard to the subject arrest, they would still be entitled to qualified immunity:

> It is now clear that government officials are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of a which a reasonable person would have known.

Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

Under Harlow this determination requires an objective, not subjective, analysis. McSurley v. McClellan, 697 F.2d 309, 316 (D.C. Cir. 1982). Harlow thus places squarely on the plaintiff the burden of showing a "prima face [sic] case of defendants' knowledge of impropriety, actual or constructive." Krohn v. United States, 742 F.2d 24, 31-32 (1st Cir. 1984); Davis v. Scherer, 468 U.S. 183, 191 (1984). Furthermore, as the Supreme Court has more recently held,

> Unless the plaintiff's allegations states [sic] a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery.

Mitchcell v. Forsyth, 472 U.S. 511, 526 (1985).

The paramount point to keep in mind in analyzing claims such as the plaintiff's, therefore, is that neither the Court nor the plaintiff can engage in an inquiry into

the state of mind of defendant in resolving the 'threshold" resolution of qualified immunity claims. Harlow, 457 U.S. at 818. Subjective inquiries are legally irrelevant. The only inquiry of any import is whether the defendants' alleged actions violated clearly established law or were objectively unreasonable.

Furthermore, as the Supreme Court and the Court of Appeals have recently explained,

> [t]he contours of the right [the official is alleged to have violated] must be sufficiently clear that a reasonable officer would understand that what he is doing violates that right.

Anderson v. Creighton, 107 S. Ct. 3034, 3038 (1987); Martin v. Malhoyt, 830 F.2d at 253.

Thus, the Supreme Court held in Anderson that even though plaintiff's Fourth Amendment rights were violated in that case, the defendant officers were entitled to assert and obtain qualified immunity

from suit individually if they could show they acted reasonably. As the Supreme Court explained in another case, qualified immunity protects from suit "all but the plainly incompetent or those who knowingly violate the law." Briggs v. Malley, 475 U.S. 335, 341 (1986).

Here, it is clear that the marshals acted reasonably in executing Judge Teel's order. The statute governing the U.S. Marshal's duties and powers, 28 U.S.C. § 566(a) tells the U.S. Marshals that their primary duty is to "[o]bey, execute and enforce all orders of the United States District Court." In addition, as noted by the Ninth Circuit in McQuade v. United States, 839 F2d [sic] 640, 643 (9th Cir. 1988), the caselaw establishes that a marshal's duty is to obey judicial orders, not to question their validity:

> [plaintiff argues] that the Marshal and the Bureau did not exercise due

> care in the conduct of their duties by failing to question the validity of the court order under which he was detained. We disagree. The Marshall and the Bureau owed no duty to [plaintiff] to question the validity of the court order. See Whirl v. Kern, 407 F.2d 781, 791 (5th Cir. 1969) ("a jailer cannot be held liable for errors in a warrant of commitment fair and valid on its face"), cert denied, 396 U.S. 901 (1969); Francis v. Lyman, 216 F.2d 583, 585 (1st Cir. 1954) (Correctional officers had "neither the legal duty nor legal authority ... to go behind ... [a] judicial order of commitment to inquire into [its] validity"; Zuranski v. Anderson, 582 F. Supp. 101, 109 (N.D. Ind. 1984) ("[t]o require the sheriff or warden to investigate each order of commitment by a judge and to independently determine if the sentence was legally imposed would be absurd").

Thus, it is clear that the Marshals acted reasonably and are entitled to qualified immunity.

CONCLUSION

For the forgoing [sic] reasons, all claims against the newly named defendants should be dismissed with prejudice. In addition, for the reasons articulated in

defendants' first motion for summary judgment, all claims against the remaining defendants represented by the undersigned counsel should be dismissed.

Respectfully submitted,

/s/ Jay B. Stephens
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United States Attorney

/s/ John D. Bates
JOHN D. BATES, D. C. Bar No. 934827
Assistant United States Attorney

/s/ Michael T. Ambrosino
MICHAEL T. AMBROSINO
Assistant United States Attorney

FILED APRIL 19, 1990

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SHIRLEY M. KEARING Plaintiff,	)	
v.	)	Civil Action No. 89-293-GAG
THE HONORABLE S. MARTIN TEEL JR., et al., Defendants	)	

MOTION OF DEFENDANTS TEEL, BLOOM, EARLY, WAITES, RUTHERFORD, NEELY, KERR AND LINK TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

Defendants Judge Teel, Martin Bloom, Dennis Early, John Waites, Herbert Rutherford, Joann Neely, Victor Kerr and Daniel Link, through their undersigned counsel, move pursuant to Fed.R. Civ. P. 12 to dismiss plaintiff's first amended complaint. At the time plaintiff filed her amended complaint, motions to dismiss plaintiff's original complaint had been filed on behalf of defendants Judge Teel, Martin Bloom, Dennis Early and John Waites.

So far as those defendants are concerned, the amended complaint raises the same legal issues that the original complaint raised. Accordingly, pursuant to Fed. R. Civ. P. 10, we hereby incorporate by reference our original motion to dismiss and the memorandum in support thereof and request that all claims against defendants Judge Teel, Martin Bloom, Dennis Early, and John Waites be dismissed.

Although the amended complaint names four new defendants (Rutherford, Neely, Kerr and Link), it raises no new legal issues or factual allegations. Thus, defendants, Rutherford, Neely, Kerr and Link therefore move this Court pursuant to Rule 12(b)(1), (4), (5) and (6), Federal Rules of Civil Procedure, to dismiss all claims filed against them individually for lack of jurisdiction over the subject matter, insufficiency of process,

insufficiency of service of process and failure to state a claim upon which relief can be granted. In addition, all of the newly named defendants are immune from suit. We attach a memorandum of points and authorities in support of this motion. For the reasons set forth in defendants original motion to dismiss, memorandum in support thereof and the memorandum attached to this motion, plaintiffs amended complaint should be dismissed, with prejudice.

Respectfully submitted,

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United States Attorney

/s/ John D. Bates
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FILED APRIL 19, 1990

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 90-5062
(C.A. No. 89-2837)

SHIRLEY M. KEARING
Appellant,

v.

THE HONORABLE S. MARTIN TEEL JR., et al.,
Appellees.

FEDERAL APPELLEES' MOTION FOR SUMMARY AFFIRMANCE

Federal appellees, the Honorable S. Martin Teel, U.S. Bankruptcy Judge for the District of Columbia, Martin L. Bloom, Clerk of the U.S. Bankruptcy Court for the District of Columbia, John Waites, United States Trustee, Dennis Early, Office of the United States Trustee, Herbert Rutherford, United States Marshal for the District of Columbia, and Joann Neely, Victor Kerr and Daniel Link, Deputy United States Marshals for the District of Columbia, respectfully

move the Court for summary affirmance of the February 13, 1990 order of the Honorable Gerhard A. Gesell, dismissing this action. A copy of the District Court's opinion and order is attached.

Federal appellees submit that the merits of the case are sufficiently clear to justify summary disposition. See, e.g., Walker v. Washington, 627 F.2d 541, 545 (D.C. Cir.) (per curiam), cert. denied, 449, U.S. 994 (1980).

I.

This action stems from Mrs. Kearing's allegations of illegal arrest and incarceration by deputy marshals who were acting pursuant to a valid contempt order. Judge Teel found appellant in contempt of court after she had been deliberately uncooperative in an involuntary bankruptcy proceeding. She was instructed to surrender herself to the United States

Marshal or face arrest. Appellant moved for an extension of time in which to file objections to the contempt order. On October 13, 1988, Judge Teel granted her an extension and ordered that she be permitted to file any objections on or before October 24, 1988.

In the interim, the U.S. marshals, without knowledge of the extension of time, arrested appellant at 3:15 p.m. on October 14, 1988. Judge Teel was serving on the bench at the time of the arrest. Upon recess, Judge Teel learned of the arrest and immediately issued an order for appellant's release at 4:02 p.m., less than an hour after her arrest.

Appellant's amended complaint alleged that appellees "through malfeasance, misfeasance and nonfeasance of duty" caused "a tortious act" and violated appellant's due process rights by "consummating an

illegal arrest and incarceration." It failed, however, to explain how the various persons named therein were involved in the alleged due process violation. The District Court held that amended complaint failed to state a claim upon which relief may be granted and failed to state a constitutional tort claim. Mem. Op., at 3. Specifically, the court concluded that no claim existed under 42 U.S.C. § 1983 because the amended complaint failed to allege any action by any person under color of state law. The District Court also found that the amended complaint failed to state a Bivens claim against any of the federal appellees.

The District Court dismissed the claim against Early and Waites for failure to meet the heightened pleading standard since the mere fact that Early was involved in the appointment of the bankruptcy trustee

and Waites was his superior did not amount to an alleged constitutional violation. Id., at 5. Moreover, it held that Judge Teel was entitled to absolute immunity since he was empowered to hold appellant in contempt under Bankruptcy Rule 9020 and therefore did not act in the clear absence of all jurisdiction. Id. The judicial immunity was held to extend to Bloom and the four marshals since their actions were closely associated with the judicial process. Id. Finally, the District Court noted that even if the marshals exercised independent discretion in carrying out the arrest, they would be entitled to qualified immunity under Harlow v. Fitzgerarld, 457 U.S. 800 (1982), because a reasonable person in their situation would not have known that their conduct violated clearly established law and there was no evidence whatsoever to suggest that they knew that

Judge Teel had stayed the contempt order. Id., at 5-6.

Based on these findings, the District Court dismissed this case with prejudice. This appeal followed.

II.

The District Court correctly held that appellant failed to meet the heightened pleading standard. This Court has explained on several occasions that Bivens plaintiffs are held to a "heightened pleading standard" which requires them "at the very least [to] specify the ±clearly established' rights they allege to have been violated with ... precision." Martin v.Malhoyt, 830 F.2d 237, 253 (D.C. Cir. 1987), quoting Smith v. Nixon, 807 F.2d 197, 200 (D.C. Cir. 1986), and Hobson v. Wilson, 737 F.2d 1, 29 (D.C. Cir. 1984), cert. denied, 470 U.S. 1085 (1985). This heightened pleading standard is applicable

to all Bivens cases, no matter what allegations are made. See Siegert v. Gilley, 895 F.2d 797 (D.C. Cir. 1990), Whiteacre v. Davey, 890 F.2d 1168 (D.C. Cir. 1989); Martin v. Malhoyt, 830 F.2d at 253 and n.40. See also Hobson, supra, 737 F.2d at 29-31; Martin v. D. C. Metropolitan Police Dept., 812 F. 2d 1425, 1435-36 (D.C. Cir. 1987), vacated in part, 817 F.2d 144 (D.C. Cir. 1987), vacated part reinstated, 824 F.2d 1240, 1246 (D.C. Cir. 1987). It requires the plaintiff to state facts with particularity in the complaint that demonstrate "who did what to whom and why." Dewey v. University of New Hampshire, 694 F.2d 1, 3 (1st Cir. 1982), cert. denied, 461 U.S. 944 (1983). See also Rochon v. FBI, 691 F. Supp. 1548 (D.D.C. 1988). Thus, as this Court explained in the conspiracy setting,

> [u]nsupported factual allegations which fail to specify in detail the factual

> basis necessary to enable [defendants] to intelligently prepare their defense, will not suffice to sustain a claim of governmental conspiracy to deprive [plaintiff] of [her] constitutional rights.

Martin v. Malhoyt, 830 F.2d at 257.

As noted by the District Court, appellant's amended complaint utterly fails to allege any specific act or omission of any specific appellee. Mem. Op. at 2. It merely draws broad legal conclusions including the allegation that her arrest was illegal. Thus, the District Court properly held that these allegations were clearly insufficient to meet the heightened pleading requirement and the claims against Early and Waites were properly dismissed on that basis.

Moreover, the District Court properly found that the amended complaint failed to state a claim upon which relief can be granted since the conduct complained of does not give rise to a constitutional

deprivation. See, e.g., Reuber v. United States, 750 F.2d 1039, 1054 (D.C. Cir. 1984). As noted by this Court in Sami v. United States, 617 F.2d 755, 773 (D.C. Cir. 1981), "it takes more than a false arrest or malicious prosecution to rise to the dignity of a constitutional violation, despite the loss of liberty that may be involved." Similarly, the Supreme Court in Baker v. McCollan, 443 U.S. 137 (1979), held that the mistaken arrest and eight-day imprisonment of the plaintiff in that case was not a constitutional violation. Thus, appellant's detention for less than an hour in this case certainly falls short of stating a constitutional violation.

Furthermore, the District Court properly held that appellant's claims against Judge Teel, Bloom and the four marshals are barred by absolute judicial immunity. Mem. Op., at 5. It is well established that

Judges are absolutely immune from civil liability for damages for their judicial acts. Bradley v. Fisher, 13 Wall. 335, 347 (1872). The broad application of this principle was summarized by the Supreme Court in Stump v. Sparkman, 435 U.S. 349, 356-57 (1978):

> A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the "clear absence of all jurisdiction."

In that case, the Supreme Court distinguished between an act in the clear absence of jurisdiction and an act in excess of jurisdiction:

> [I]f a probate judge, with jurisdiction over only wills and estates, should try a criminal case, he would be acting in the clear absence of jurisdiction and would not be immune from liability for his action; on the other hand, if a judge of a criminal court should convict a defendant of a nonexistent crime, he would jurisdiction and would be immune. Stump, 435 U.S. at 357 n.7, citing Bradley, 13 Wall., at 352.

Since Judge Teel clearly had subject matter jurisdiction over the bankruptcy proceedings and was empowered under Bankruptcy Rule 9020 to hold appellant in contempt, he has absolute immunity from suit. See O'Neil v. City of Lake Oswego, 642 F.2d 367, 369 (9th Cir. 1981) (Judge who convicted defendant for contempt, an act within the court's jurisdiction, but without the affidavit required by statute to confer jurisdiction over the offense charged, was still entitled to immunity.[11]

Martin Bloom, clerk at the U.S. Bankruptcy Court, and the four U.S.

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[11] It is a fair inference that appellant filed this action to harass the federal appellees shortly after she learned of a second contempt order (and more than a year after the original contempt order). Recently, the Supreme Court reiterated the principle initially stated in Bradley that "judicial immunity also protect[s] judicial independence by insulating judges from vexatious actions prosecuted by disgruntled litigants." Forrester v. White, 108 S.Ct. 538, 543 (1988).

marshals are also entitled to absolute judicial immunity since the only possible act which they could have allegedly been associated with was the execution of the contempt order. See Scott v. Dixon, 720 F.2d 1542, 1546-47 (11th Cir. 1983), cert. denied, 469 U.S. 832 (1984) (extending absolute judicial immunity to Clerk of State Court of Glynn County, Georgia, who issued an arrest warrant); Panko v. Rodak, 606 F.2d 168, 171 (7th Cir. 1979), cert. denied, 444 U.S. 1081 (1980) (extending absolute judicial immunity to Clerk and Assistant Clerk of the United States Supreme Court); U.S. Steelworkers of America, AFL-CIO v. Bishop, 598 F.2d 408, 414 (5th Cir. 1979) (absolute immunity applicable to marshals executing magistrate's order.[12] The only remaining

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[12] The District Court properly noted that even if the Court were to assume that the marshals exercised independent

federal appellees, Dennis Early and John Waites, had absolutely no involvement in the issuance or the execution of the contempt order and were clearly improper parties to this action.

Finally, since the act complained of was carried out by federal officials acting under color of federal law, the district court properly rejected appellant's claim under 42 U.S.C. § 1983. The only act mentioned in the amended complaint involved an arrest pursuant to a federal contempt order, issued by a federal Judge and executed by federal marshals. Accordingly, there is no valid basis for a claim under section 1983, in that appellant's

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discretion in carrying out the arrest, they were nevertheless entitled to qualified immunity under Harlow v. Fitzgerald, 457 U.S. 8090 (1982), "because a reasonable person in their situation would not have known that their conduct violated clearly established law." Mem. Op., at 6. See also Anderson v. Creighton, 107 S.Ct. 3034 (1987).

allegations are against federal officials acting under color of federal law:

> Section 1983 provides a remedy only for deprivation of constitutional rights by a person acting under color of law of any state or territory or the District of Columbia.

Dale-Murphy v. Winston, 837 F.2d 348 (9th Cir. 1987).

III.

For all of the foregoing reasons, the federal appellees respectfully submit that the judgment of the District Court should be summarily affirmed.

/s/ Jay B. Stephens
JAY B. STEPHENS
United States Attorney

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

In Re:	)	
Leon R. and	)	
Shirley M. Kearing	)	File No. 89-7211
Movants, Pro Se	)	
	)	
Debtors, Pro Se	)	Bankruptcy Case
	)	No. 86-00913
	)	(Chapter 11)
	)	
Appellants, Pro Se	)	District Court
	)	Appeal Case
	)	No. 88-1232 TPJ

BRIEF

The Kearings feel that this bankruptcy proceeding has become such a "travesty of justice" that even some of the best legal minds in bankruptcy practice throughout this country, as well as themselves, are totally appalled at the gross irregularities.

The bankruptcy process is a structured field -- basically administrative -- governed by statutory law with definitive restrictions placed upon all the

participants.

This proceeding has become such a glaring example of "inside players making up the rules as they go along" that only the myopic would be remiss to encounter the utter contempt and disregard these "players" have had of the Kearings' right to "due process" under the law as guaranteed by Amendment V of the United States Constitution.

The financial difficulties for the Kearings began in early 1986 after they had increased secured loans on their real property, incurred excessive consumer debt and made an imprudent investment in three (3) condominium units at the Hastings Condominium located at 4444 Connecticut Ave, N.W., Washington, D. C.

On November 6, 1986, the Kearings became co-plaintiffs in a multi-plaintiff action in the Superior Court for the District of

Columbia, entitled Hastings Condominium Association, Inc., v. National Bank of Washington, et al [CA 09219-86], of which Standard Federal Savings & Loan Association, now known as Standard Federal Savings Bank, was alleged, among other things, of being a major participant in the development, marketing and financing of the Hastings Condominium.

The complaint in this litigation contains 18 causes of action under the following categories:

(1) negligence and negligent misrepresentation;
(2) actual common law fraud;
(3) constructive common law fraud;
(4) breach of contract;
(5) breach of express warranties;
(6) breach of implied warranties;
(7) breach of warranty contained in D. C. Condominium Act of 1976;
(8) breach of fiduciary duty;
(9) negligent construction;
(10) violation of D. C. Consumer Protection Procedures Act of 1976;
(11) violation of D. C. Condominium Act of 1976; and,
(12) civil conspiracy to violate D. C. law.

The complaint seeks actual damages of $5,000,000.00 and punitive damages of $5,000,000.00; and recision of the underlying purchase contracts, with a full refund of the purchase price for each condominium unit plus interest.

On or about November 18, 1986, the Kearings employed, by written agreement, an attorney, Alfred Lawrence Toombs, Esq., for legal advice and representation ONLY in a Chapter 13 [adjustment of debts of an individual with regular income] bankruptcy proceeding under 11 U.S.C.

This attorney was paid a $2,500.00 cash retainer and the Kearings agreed to an hourly rate of $125.00 thereafter, plus expenses. The retaining fee was paid by one Doug Smith who had held an escrow account on the Kearings' condominium units.

At attorney Toombs' insistence the Kearings made bi-weekly payments of $700.00

to him until they had paid over $7,500.00 beyond the original retainer - all the while neglecting their other outstanding personal financial responsibilities such as utilities, doctor bills, automobile upkeep and other household expenses.

On December 10, 1986, attorney Toombs, upon a more thorough investigation of the Kearings' financial records, discovered that the Kearings were ineligible to enter into a Chapter 13 and proceeded to file [and personally pay the filing fee], without consent or written authorization from the Kearings, a voluntary petition in the Bankruptcy Court for the District of Columbia for relief under Chapter 11, Reorganization, of 11 U.S.C. and not Chapter 13, the so-called "wage earner plan" as had been agreed upon.

Assets of approximately $1,166,327.00 were listed which included the Kearings'

equity in five (5) real estate properties totaling approximately $161,000.00:

(1) 6612 Millwood Road, Bethesda, Maryland 20817;
(2) 4444 Connecticut Avenue, N. W., Condominium Unit 201 (the "Hastings"), Washington, D. C. 20008
(3) 4444 Connecticut Avenue, N. W., Condominium Unit 502 (the "Hastings"), Washington, D. C. 20008
(4) 4444 Connecticut Avenue, N. W., Condominium Unit 504 (the "Hastings"), Washington, D. C. 20008; and
(5) 4801 Van Ness Street, N. W., Washington, D. C. 20016.

The Kearings' total approximate liabilities were $902,345.00, leaving them a net worth of almost $265,000.00 -- a far cry from insolvency. The Kearings remained debtors-in-possession of their estate.

"Exhibit B" of the Kearings' petition was never signed or filed by attorney Toombs as required by Section 322 of Pub.L. 98-353, July 10, 1984, and Section 283(aa) of Pub.L. 99-554, October 27, 1986; both mandate that counsel certify that a full

explanation of the relief available to "consumer" debtors under 11 U.S.C. has been given. Whether or not this was intentional pales to the fact that the Kearings, themselves, were never told by attorney Toombs about any chapter proceedings in bankruptcy.

And by his failure to sign "Exhibit B," attorney Toombs defeated the specific requirements under Rule 9011 of the Rules of Bankruptcy Procedure and Rule 11 of the Rules of Federal Civil Procedure which both state:

> a signature constitutes a certificate by him [the attorney] that ... it is well grounded in fact and is warranted by existing law; and that it is not interposed for any improper purpose, such as to harass, to cause delay or to increase the cost of litigation.

Rule 9011 continues:

> Every petition ... filed in a case under the Code on behalf of a party represented by an attorney ... shall be signed by at least one attorney of record in his individual name.

If a document is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the person whose signature is required.

Rule 11 states:

Every pleading, motion and other paper of a party represented by an attorney shall be signed by at least one attorney ....

If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant.

Regardless, on and after December 10, 1986, no attempt, as required by 11 U.S.C. 1102(a)(1), "as soon as practicable after the order for relief ..." was, or has been, made by "the United States Trustee [who] shall appoint a committee of creditors holding unsecured claims ...."

On January 20, 1987, the Kearings filed with the Clerk of the Bankruptcy Court a praecipe for change of address from 4341 Embassy Park Drive, N. W., Washington, D. C. 20016, to their current home address of

4801 Van Ness Street, N. W., Washington, D. C. 20016.

This is of the utmost importance for two reasons:-

(1) No noticing was timely received by the Kearings; and
(2) No change was made by the Clerk of the Bankruptcy Court until so demanded, personally, by the Kearings ALMOST A YEAR LATER in early 1988.

On April 15, 1987, an attorney -- purportedly representing a secured creditor as counsel for Chevy Chase Savings Bank, F.S.B. -- filed a motion to convert the Kearings' Chapter 11, Reorganization, proceeding to a Chapter 7, Liquidation, proceeding, or in the alternative, to appoint a trustee.

There is a grave question as to whether or not this attorney represents a secured creditor and has standing in this bankruptcy proceeding.

The Kearings initiated a mortgage with

B. F. Saul Mortgage Company in September of 1983, and this company is named first mortgagee in the deed as holder of the note; however, through B. F. Saul Mortgage Company this note was sold in the "jumbo" secondary market to Aetna Casualty Company, who in turn then became the first mortgagee.

Chevy Chase Savings Bank, F. S. B., a subsidiary of B. F. Saul Mortgage Company, then became the servicing agent for Aetna; however, they were not "trustee" on the deed as American Security Bank was the deed of trust holder until a Ronald Chasen, of Chasen and Chasen law firm -- at which the above attorney is employed -- recorded himself as a "substitute trustee" on December 8, 1986, recorded January of 1987, and this was after notification by the Kearings attorney that they were, indeed, going to file bankruptcy.

This Court must determine whether or not there is standing for this attorney, who has held himself out at all times in this proceeding not as an agent but a secured creditor, to bring motions of any kind into the Bankruptcy Court.

On April 21, 1987, counsel for Standard Federal Savings Bank, another secured property creditor, filed a motion to lift the automatic stay in order to foreclose on the Kearings' three condominium units at the "Hastings."

On April 28, 1987, notice to creditors was given for the sale of the Kearings' income-producing, rental property located on Millwood Road.

The Bankruptcy Court-ordered, fair market value appraisal of that Millwood property was $290,000.00.

On April 28, 1987, the same day that notice was sent to sell the Millwood Road

property, attorney Toombs filed for an award of interim compensation in the amount of $17,344.00 and reimbursement of expenses of $269.59.

On April 30, 1987, the Kearings submitted a memorandum in opposition to motions of Standard Federal Savings Bank to vacate the automatic stay.

On May 29, 1987, the Bankruptcy Court entered an order allowing and approving the sale of the Millwood Road property at $23,200.00 less than its appraised value.

The net proceeds from the sale were ordered to be held in escrow by attorney Toombs. [Note: Additional income from other rental properties was also being held by attorney Toombs and no accounting or bank statements have ever been filed with the Bankruptcy Court to enable the Kearings, or anyone else for that matter, to determine whether any co-mingling of

funds by attorney Toombs has occurred.]

On July 16, 1987, hearing was held and a continuance was ordered until November 6, 1987, on Standard Federal Savings Bank's lift stay motion of April 21, 1987.

The Bankruptcy Court outlined, at this hearing, an alternative to immediate foreclosure, pending resolution of the litigation in the Superior Court, under which the Kearings could adequately protect Standard Federal Savings Bank by making payment of interest on such sums as "might be expected" to be recovered at foreclosure sales of the units involved, such interest to run beginning August 16, 1987.

On July 17, 1987, counsel for Chevy Chase Savings Bank, F.S.B. filed a praecipe to withdraw, without prejudice, its motion of April 15, 1987, to convert the proceedings to a Chapter 7 proceeding, or in the alternative, appoint a trustee.

On August 10, 1987, a plan of reorganization was filed, classifying claims which provided approximately 26 percent payback on unsecured claims, and the continuance of the suit against Standard Federal Savings & Loan.

A Bankruptcy Court-ordered disclosure statement was to be filed by August 28, 1987.

No disclosure statement has ever been filed.

On September 10, 1987, the Bankruptcy Court entered an order awarding attorney Toombs interim fees in the amount of $23,744.00, including direct payments previously made by the Kearings upon attorney Toombs' insistence totaling $6,400.00.

On September 17, 1987, one week after receiving his first interim fees, attorney Toombs filed an application for a

supplemental award of compensation and reimbursement of expenses in the amount of $20,036.25, reduced by credited direct payments by the Kearings, again induced by attorney Toombs' insistence, of $1,161.23.

On October 6, 1987, the Kearings, pro se, filed a personal plea for intervention by the Bankruptcy Court concerning their case including all these attorney's fees.

This document was presumably forwarded to the Office of the United States Trustee; no one is sure whether or not it was.

The Kearings made provable allegations that their estate was in jeopardy due to the actions of attorney Toombs and requested assistance, inter alia, for the monitoring of compensation and reimbursements filed under 11 U.S.C. 330.

Such monitoring should have already been done by the United States Trustee who is required, pursuant to 28 U.S.C. Section

586(A),(B),(F) and (G), to "monitor plans and disclosure statements, monitor the progress of cases...to prevent undue delay," or "... matters which relate to ... a crime under the laws of the United States ..."

No response, or action, has ever been taken on the Kearings' October 6, 1987, plea for intervention; and it is unknown whether the U.S. Trustee, in fact, ever received this document.

On October 6, 1987, the Kearings, pro se, requested, in writing, a hearing on the application for fees and expenses filed by attorney Toombs on September 17, 1987.

No notice or hearing has occurred.

On October 6, 1987, the Kearings, pro se, filed a request for consent to handle the sale of the Van Ness Street property that attorney Toombs had put up for sale.

No notice, hearing or ruling has ever

occurred on the Kearings' motion.

On October 8, 1987, notice to sell the Van Ness Street property was given by the Bankruptcy Court.

On October 26, 1987, the Kearings, pro se, relieved their attorney Toombs from further representation.

During prior negotiations (still without authorization or consent of the Kearings but before his firing) then attorney Toombs obtained Standard Federal Savings Bank's consent to the interest payment plan outlined above (July 16, 1987), and to which the Kearings were agreeable.

However, previous attorney Toombs, without authorization or consent of the Kearings and after being fired on October 26, 1987, but before a hearing on November 6, 1987, entered into negotiations with Standard Federal Savings Bank for complete disposition of the

Kearings' three "Hastings" condominium units.

On November 3, 1987, attorney Toombs filed application for leave to withdraw as counsel.

On November 4, 1987, the Kearings were sent notice by mail to the Embassy Park Drive address (and contacted by the Clerk of the Bankruptcy Court by telephone on November 4, 1987) of a hearing set two days hence, November 6, 1987, on:

(1) the "application of Alfred Lawrence Toombs, Esq., for leave to withdraw as counsel for debtor [sic] in possession" and response by debtors thereto;
(2) the "request for approval of sale of real property at 4801 Van Ness Street, N. W., Washington, D. C.;" and
(3) the "application by debtor's [sic] counsel for supplemental award of compensation."

On November 6, 1987, the Kearings, pro se, filed a motion in the Bankruptcy Court to deny approval of sale of the Van Ness Street property because "[d]ebtors have not received proper or ethical legal advice."

On November 6, 1987, the Kearings, pro se, filed an application for an expedited hearing for:

(1) removal of attorney Toombs for failure to perform all of the duties of an attorney;
(2) revocation of the order awarding attorney Toombs interim compensation and expenses;
(3) denial of subsequent compensation and expenses to attorney Toombs; and
(4) request for appointment of an examiner under 11 U.S.C. 1104(b)(1).

1104(b)(1) states:

... if the court does not order the appointment of a trustee[,] ... on request of a party in interest ... and after notice and hearing, the court shall order the appointment of an examiner ... [for] investigation of any allegations of fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity ... of the affairs of the debtor ....

This section is consistent with the judicial economy set out in HR 95-595, at page 402, where Congress states in part:

generally a trustee would not be needed ... where the protection ... could equally be afforded by an examiner.

Additionally, an analysis of the costs and benefits of an examiner - paid an

hourly or a flat fee - versus a trustee - who commands a percentage payment for transactions he churns within a debtor's estate - should be made by the Bankruptcy Court.

No notice, hearing or ruling has ever occurred on the Kearings' motion for appointment of an examiner.

On November 6, 1987, the Kearings, pro se, filed a further answer to Standard Federal Savings Bank's lift-stay motion of July 16, 1987, which included that to their knowledge and belief, a recently purchased condominium unit in the "Hastings" building, after deduction for fees and costs, realized a foreclosure price of approximately $90.00 per square foot. Each of the Kearings' condominium units, in foreclosure, then, would be worth about $76,500 net, after expenses of sale if that figure were to be used to calculate the

square footage price.

The Kearings proposed to pay 7 1/2 percent simple interest per annum on that foreclosure price until resolution of pending litigation in Superior Court.

On November 6, 1987, at the hearing, the following events occurred:

(1) The Bankruptcy Court urged the Kearings to retain new counsel; that appearance should be entered on or before December 7, 1987; or absent that, "unless contrary be timely shown," a trustee would be appointed.

(2) The Bankruptcy Court, on its own, requested and allowed an oral motion by counsel for Chevy Chase Savings Bank, F. S. B., for removal of debtors-in-possession and appointment of a trustee even though such counsel had previously withdrawn the same motion on July 17, 1987.

No evidence was presented or testimony given.

Twenty days notice was to be given on such motion.

Notice to the Kearings was sent to the wrong address (Embassy Park Drive) and was received after December 1, 1987.

(3) Standard Federal Savings Bank was instructed to send a twenty day notice along with a proposed settlement order for a "deed in lieu of foreclosure" that previous attorney Toombs and Standard Federal had entered into unbeknownst to the Kearings until this hearing.

(4) Previous attorney Toombs was ordered to fully cooperate with either the Kearings' new counsel or a trustee.

On November 9, 1987, attorney Toombs, as a shield in an attempt to deflect provable allegations by the Kearings for incompetent bankruptcy advice, practice and deceit, filed for a protective order inaccurately alleging the Kearings, in their motion of November 6, 1987, had filed "scandalous or defamatory matter."

On November 25, 1987, the Kearings filed an emergency motion for use of funds of the estate for, among other things, the hiring of new counsel as the Bankruptcy Court had countenanced on November 6, 1987.

No notice or hearing on such emergency motion has ever occurred.

On December 3, 1987, the Bankruptcy Court issued a protective order for previous attorney Toombs under Rule 9018(2) of the Rules of Bankruptcy Procedure.

On December 7, 1987, the Kearings complied with the Bankruptcy Court's mandated deadline, anyway, hiring new counsel and in so doing retained a nephew-in-law, Michael R. Huffstetler, Esq., who agreed to take the case for expenses (no charge for his services). The Kearings also filed an application "for leave to hire attorney and for payment from funds of the estate" to be made to attorney Huffstetler for expenses.

On December 9, 1987 - almost one year to the day from the filing of the order for relief - the Bankruptcy Court ordered the appointment of a trustee, removing the Kearings as debtors in possession for "incompetence," despite the Kearings'

compliance with the Bankruptcy Court's deadline for retention of counsel, and despite the absence of allegations or a hearing regarding competency or any other allegations alluding to nonfeasance, malfeasance or misfeasance by the Kearings.

On December 15, 1987, the United States Trustee appointed John W. Guinee, Jr., as trustee and fixed bond at $50,000.00.

On December 17, 1987, previous attorney Toombs filed a "suggestion of appropriateness of disposition of application of supplemental award of [the] compensation and reimbursement of [the] expenses" which he had initially requested on September 17, 1987.

On December 17, 1987, the appointed trustee, only two days after his appointment, before any qualification criteria was met [Note, too, that he has yet to meet any] and before obtaining or

reading the Kearings' file, stated, in writing, that even though he had only conversed with the former attorney, counsel for one creditor and with one of the Kearings, he intended:

(1) to dispose of some of the real property of the Kearings' estate;
(2) to enter into settlement agreements on other real property;
(3) to submit a plan for full payment of all claims against the estate of the Kearings - a so-called "100% plan" - whether or not the Kearings consented, or even had the ability, to carry out such a plan; and
(4) to approve the application of previous attorney Toombs for compensation.

On December 23, 1987, the Kearings filed for an "emergency application for removal of the Chapter 11 trustee, John W. Guinee, Jr., and for [the] appointment of an examiner" stating, among other things, that two recent major and explicit violations of the Bankruptcy Code had been made, not to mention the allegations of impropriety previously raised in the Kearings' November 6, 1987, filings.

First, the United States Trustee never consulted with any party in interest before appointing the trustee or never received court approval of his appointment as required by 11 U.S.C. 1104(c).

11 U. S. C. 1104(c) states that "the United States Trustee, after consultation with the parties in interest, shall appoint, subject to the court's approval ... [a] trustee."

Second, a number of required procedures were not followed. Rule 2008 of the Rules of Bankruptcy Procedure states that "[t]he clerk shall immediately notify the trustee of his selection, how he may qualify and, if applicable, the amount of the bond. The trustee shall notify the court in writing of the acceptance or rejection of the office within five days after receipt of notice of selection."

11 U. S. C. 322(a) provides that "a

person selected under section ... [11 U.S.C.] 1163 ... qualifies if before five days after such selection, and before beginning official duties, such person has filed with the court a bond in favor of the United States ...."

Rule 2010(c) of the Rules of Bankruptcy Procedure states that "a certified copy of the order approving the trustee's bond or of the acceptance filed under subdivision (b) of this rule shall constitute conclusive evidence of qualification."

Subdivision (b) of Rule 2010 states that "a trustee for whom a blanket bond has been filed shall qualify by filing an acceptance of the election or appointment."

None of these procedures was followed.

On December 23, 1987, in "affirmation in support of debtors application for retention of counsel," attorney Huffstetler disclosed that he and his

brother-in-law, a partner in the law firm where attorney Huffstetler is employed, were nephews-in-law of one of the Kearings.

On December 28, 1987, previous attorney Toombs in flagrant and direct violation of Bankruptcy Rule 9003 and Local Rule 106(b), wrote an ex parte letter to the Bankruptcy Judge suggesting that prior to entry of turnover of funds of the Kearings' estate from his escrow account to the appointed trustee, "the Court might limit the turnover order to those funds not subject to the pending fee application. There are presently $28,818.41 in funds ... [P]ending application seeks payment of ... $19,228.48."

On December 29, 1987, previous attorney Toombs, in writing, denied release of any of the Kearings' files, in defiance of the Bankruptcy Court order of November 6, 1987, stating he held an "attorney's retaining

lien" for his claim of post-petition administrative expenses; yet, if adequate security were given, such as "an agreement to consent to my pending and final applications" for compensation, he would release the file.

On January 4, 1988, the Bankruptcy Court entered a final order denying the Kearings' emergency application filed on December 23, 1987, that dismissed all of the Kearings' reasons given for removal of the trustee and appointment of an examiner as "... none ..." being "meritorious."

On January 4, 1988, the Bankruptcy Court denied the Kearings use of any of the funds of the estate as requested on November 25, 1987, delaying this decision for almost two months with full knowledge that the Kearings' income had been temporarily reduced by half from mid-October until December of 1987; and denied, "without

prejudice, debtors right to retain [Mr. Huffstetler as] counsel ... to represent them ... as debtors in possession [although he could represent them as debtors but] ... not to be paid out of assets of their estate."

In its order, the Bankruptcy Court also stated that "contrary to debtors assertion in their application that Mr. Huffstetler is ±not a[n] ... insider' and a ±disinterested person,' that under 11 U.S.C. 101(39) they [sic] are her relatives; therefore insiders as defined by 11 U.S.C. 101(30)(A)(i) and not disinterested persons as defined by 11 U.S.C. 101(13)(A); and hence by the express terms of 11 U.S.C. 327(a), as incorporated by 11 U.S.C. 1107, is prohibited from serving as counsel for these debtors as debtors in possession." However, the Bankruptcy Court must not have read In Re

Covey 57 B.R. 665 (Bkrtcy. D SD 1986); In Re O'Connor, 52 B.R. 892 (Bkrtcy. WD OK 1985); or In Re Heatron, Inc., 5 B.R. 703 (Bkrtcy. WD MO 1980) -- all of which shed an entirely different light on the subject.

On January 4, 1988, the Bankruptcy Court ordered the "turnover of funds of the Debtors' estate" from previous attorney Toombs to the appointed trustee. No notification to the Bankruptcy Court of any transfer or, whether the funds have been transferred or, whether a new account has even been opened or, what dollar amount of the funds was, or is to be transferred, has ever been made by previous attorney Toombs or the appointed trustee.

On January 4, 1988, the appointed trustee filed a "preliminary and partial report of trustee;" admitting that he had yet to fully investigate "the acts, conduct, assets, liabilities, and financial

condition of the debtor[s]" as required by 11 U.S.C. 1106(a)(3).

Nor, to date, has he filed a " ... statement of any investigation ..." as required by 11 U.S.C. 1106(a)(4)(A).

On January 14, 1988, notice of appeal was filed by the Kearings on all of the final orders of the Bankruptcy Court entered on January 4, 1988.

On January 14, 1988, an "emergency application for a temporary restraining order against the trustee and motion for stay of order of the Bankruptcy Judge pending appeal" was filed by the Kearings in the Bankruptcy Court pursuant, among other statutes and rules, to F.R. Civ.P. 8005.

On January 19, 1988, the appointed trustee filed a praecipe that instructed the Clerk of the Bankruptcy Court to back-date an attached bond to have an effective

date of December 15, 1987.

On January 21, 1988, previous attorney Toombs filed a "petition for immediate disposition of application for supplemental award of compensation and reimbursement of expenses" wherein he perjured himself by stating, among other things, that the Kearings had made no "particularized or specific objection thereto," which they had and have in their motion of November 6, 1987, a copy of which was given to previous attorney Toombs during the November 6, 1987, hearing and portions of which he had removed pursuant to his protective order of December 3, 1987.

Previous attorney Toombs also perjured himself by stating that "[n]o evidence was presented ... in opposition thereto...," which there was and is in the same motion.

Again, in flagrant and direct violation of Bankruptcy Rule 9003 and Local Rule

106(b), previous attorney Toombs wrote an ex parte letter to the Bankruptcy Judge "request[ing] ... [that] no later than Friday, January 22, 1988, ... this petition and ... proposed order will be acted upon prior to the expiration of your term."

On January 22, 1988, the very next day, the Bankruptcy Court ordered the payment to previous attorney Toombs of $15,221.23, reducing his compensation from the requested amount of $19,228.48, "based in light of counsel's level of experience in Chapter 11."

On January 25, 1988, the Kearings filed in the District Court an ex parte "emergency motion for a stay of all judgments, orders, decrees, and for other relief pending appeal."

On January 26, 1988, the District Court [Harris, J., as motions judge] stayed its ruling on the merits of the emergency

motion and remanded the case for consideration by the Bankruptcy Court of the Kearings' motion for a temporary restraining order, and further ordered that the District Court would hold its motion for an emergency stay "in abeyance" until the Bankruptcy Court had adequate opportunity to consider the motion and to have a hearing, if necessary.

On January 29, 1988, the Bankruptcy Court, without a hearing, denied the emergency application and motion filed on December 23, 1987, as being "legally frivolous and designed solely to harm the Trustee and to cause delay;" and stated in addition with respect to the points raised in various numbered paragraphs of the Kearings' application and motion:

> 11 U.S.C. Section 1104 (c) does not require the US [sic] Trustee to consult with all parties in interest when appointing a trustee, and it would be an obvious impossibility for him to do so in cases where there are a large number of

creditors; and

Section 322(a) does not require a trustee to file an acceptance of appointment. It is this Court's understanding that Mr. Guinee is covered by a blanket bond.

The Bankruptcy Court undoubtedly has neither carefully read the statutes nor the document filed by the Kearings on December 23, 1987 for the answers by the Bankruptcy Court are just not true.

On January 29, 1988, previous attorney Toombs wrote to the managing partner of the law firm where the Kearings' nephew-in-law, attorney Huffstetler, is employed denying accusations, among other things, of perjury in previous pleadings; complaining of a typographical error ("lack of experience" rather than "level of experience") in motion papers; threatening the law firm by stating that if the accusations had been "uttered in a non-privileged forum, they would be

actionable;" and stating that "I have consulted with counsel ... and that your firm will be responsible for the conduct of your associate."

On February 8, 1988, the term expired for the initial Bankruptcy Judge (Bason) in these proceedings; a new Judge (Teel) was sworn in. The new Bankruptcy Judge had no previous experience in bankruptcy law in private practice and only limited experience through his on-the-job training while representing the Justice Department.

On February 8, 1988, a "motion to compel cooperation by debtors" was filed in the Bankruptcy Court by the appointed trustee.

No notice on such motion has ever occurred.

On February 12, 1988, the Kearings formally requested the nephew-in-law to withdraw as attorney of record to prevent problems for attorney Huffstetler with the

members of his law firm regarding the hate letter from the Kearing's previous attorney.

The Kearings have since remained pro se.

On February 17, 1988, counsel for Standard Federal Savings Bank filed a praecipe with the Clerk of the Bankruptcy Court certifying that the enclosed twenty-day notice and attachments had really been sent on December 4, 1987, pursuant to instructions of the Bankruptcy Court on November 6, 1987.

Such counsel also stated that "[t]he original was mailed to the Clerk on December 7, 1987, but did not reach the file."

The attached "notice of settlement" contained not only the wrong hearing date, but stated that "the Debtors and Standard Federal requested that the Court approve the terms of a settlement." The record of

November 6, 1987, states otherwise.

Each of the two matrices used for this noticing was dated differently and was from an entirely unrelated filing.

On February 23, 1988, an "application for authority to employ counsel for the trustee under a general retainer" was filed in the Bankruptcy Court by the appointed trustee.

On February 26, 1988, an "objection to trustee's request to employ counsel" was filed by the Kearings.

On March 21, 1988, the Kearings attempted to review their file at the office of the Clerk of the Bankruptcy Court. The Kearings were informed that the file was in use by another party; and upon inquiry, the party acknowledged affiliation with a law firm that had been retained by the appointed trustee.

Two days later, on March 23, 1988, the

Kearings received notice of a hearing of "application for authority to employ counsel for the trustee and objection thereto; and consent order granting relief from stay and authorizing debtors to execute [a] deed in lieu of foreclosure ... and objection thereto."

On April 7, 1988, at a hearing, the Kearings questioned, then vigorously objected to, an attorney's appearance for the appointed trustee before the hearing on the motion for such counsel pending before the Bankruptcy Court, but were instructed that no questions to the Bankruptcy Court about the matter would be allowed at such hearing.

The Bankruptcy Court immediately entered an order approving the "application for authority to employ counsel for trustee" over the Kearings' protestations that they could not even afford to hire, much less

pay for counsel for themselves and that it was a squandering of assets of the estate for the appointed trustee to retain one, especially since the actual retention occurred on or before March 21, 1988, before any hearing - in fact even before noticing - on the motion had occurred.

The Kearings sought continuance of the hearing until pro bono counsel could review their case and make appearance; and to restrict any action of the appointed trustee until the appeal in the District Court had been heard.

The Bankruptcy Court revoked, sua sponte, an order of the previous Bankruptcy Judge concerning collection of rents by the Kearings on their condominium units and threatened jail to the Kearings if the new order was not obeyed.

At the hearing, the Bankruptcy Court also granted the settlement order for "deed

in lieu" to Standard Federal Savings Bank (with errors still intact from their filing of "notice" on February 17, 1988).

And, finally, at such hearing and without any notice whatsoever, the Bankruptcy Court, on its own motion, entertained and allowed an unscheduled hearing on the appointed trustee's "motion to compel cooperation by debtors" and granted the motion over further protestations of the Kearings, wherein the Bankruptcy Court stated that the appointed trustee was now, for all practical purposes, the owner of the Van Ness Street property and the Kearings would physically be removed from their home if they did not cooperate with the trustee.

On April 8, 1988, counsel for Standard Federal Savings Bank, via messenger, sent a hurriedly revised and corrected copy of a settlement order from April 7, 1988, for

the Bankruptcy Judge's immediate signature.

On April 14, 1988, the Kearings filed a motion in the Bankruptcy Court for a "stay of all judgments, orders, decrees and for other relief pending appeal."

The Bankruptcy Court never responded.

On April 21, 1988, the Kearings filed an "emergency application for a temporary restraining order and motion for a stay of order pending appeal" in the Bankruptcy Court.

On April 21, 1988, the Kearings filed "notice of appeal" to the District Court:

> ... from the final order for authority to employ counsel for the trustee under general retainer' entered on April 11, 1988, and for any other orders forthcoming at hearing on April 7, 1988, of the Bankruptcy Court entered in this bankruptcy proceeding.

The "other orders forthcoming at hearing on April 7, 1988," are, to date:

> Order "approving agreement in settlement of motions seeking relief from stay, compromising mutual claims and authorizing trustee to execute deeds in

lieu of foreclosure as to Unit 201, Unit 502 and Unit 504, 4444 Connecticut Avenue, Washington, D. C." entered on April 23, 1988.

Order "approving agreement in settlement of motions seeking relief from stay, compromising mutual claims and authorizing trustee to execute deeds in lieu of foreclosure as to Unit 201, Unit 502 and Unit 504, 4444 Connecticut Avenue, Washington, D. C." entered on April 23, 1988.

Order "to compel cooperation by debtors," entered on April 25, 1988.

On April 25, 1988, the Bankruptcy Court denied the Kearings' emergency application for a restraining order and motion for a stay of April 21, 1988.

On May 19, 1988, a "motion for issuance of show cause order" was served on the Kearings. This motion alleged that the Kearings had not cooperated with the appointed trustee as instructed by the Bankruptcy Court on April 7, 1988, and were therefore in contempt of the Bankruptcy Court's order of April 25, 1988.

On May 20, 1988, the appointed trustee

filed with the District Court a motion to dismiss the appeal of April 21, 1988. On June 1, 1988, a "notice by trustee of correction of facts set forth in previously filed motion to dismiss appeal" was filed in the District Court stating that Standard Federal Savings Bank had changed the agreed upon "deed in lieu" transfer and now wished to transfer the "Hastings" property to a third party.

On June 9, 1989, the District Court ordered (Jackson, J.) the Kearings to file opposition to trustee's motion to dismiss within 11 days of date of this order, failing which their appeal would be treated as conceded and suspending brief pending outcome of trustee's motion.

On June 24, 1988, the Kearings filed for an "emergency application for a writ of mandamus" in the District Court to obtain certain records under Rule 2013(b) and (c)

of the Rules of Bankruptcy Procedure which states:

> (b) The clerk shall maintain a public record listing fees paid from estates (1) to trustees and attorneys, accountants, appraisers, auctioneers and other professional persons employed by trustees, and (2) to examiners appointed by the court. The record shall include the name and docket number of the case, the name of the individual or firm receiving the fee and the amount of the fee paid. The record shall be maintained chronologically and shall be kept current and open to examination by the public without charge.
>
> (c) At the close of each annual period, the clerk shall prepare a summary of the public record by individual or firm name, to reflect total fees paid during the preceding year. The summary shall be open to examination by the public without charge.

The Kearings were (and are) in need of this record from January, 1980, until the present date; and even if they were not, the Rule is rather precise.

The Clerk of the United States Bankruptcy Court for the District of Columbia has been unable and unwilling to produce such record even though he is, and

has been, informed that he must maintain such record.

On July 1, 1988, the Kearings filed an "emergency motion for a stay of all judgments, orders, decrees and for other relief pending appeal" in the District Court.

On July 7, 1988, the Kearings filed an answer to the motion to dismiss the appeal of April 21, 1988, submitted by the appointed trustee.

On July 8, 1988, the District Court (Jackson, J.) held hearing and denied the emergency stay of the Kearings, stating that the "deeds in lieu" had already been transferred and there was no need for the emergency stay.

On July 12, 1988, the District Court (Jackson, J.) denied the Kearings' "emergency application for writ of mandamus" for the records that are supposed

to be kept by the Bankruptcy Clerk and stated that there was "no basis" for such writ.

On July 20, 1988, the District Court for the District of Columbia (Jackson, J.) filed a memorandum and order that the Kearings file a motion for leave to appeal in the form prescribed by Bankruptcy Rule 8003(a), failing which the motion to dismiss the appeal would be granted.

The Court stated that the Kearings' issues being appealed are "clearly interlocutory in nature," including those matters the Kearings wish to raise as outlined in their statement of issues; and, all issues and matters will only be entertained by this Court "if leave to appeal is granted" under 28 U.S.C. 158(a); Bankruptcy Rule 8001(b) and 8003.

While the Kearings did not agree that all orders of the Bankruptcy Court

forthcoming at hearing on April 7, 1988, were "clearly interlocutory;" the route taken for appeal, whether "of right" or "by leave," was inconsequential so long as the District Court heard the appeal.

The Kearings then complied with the District Court's order and, in their document, filed the following questions and the relief sought as required by Rule 8003(a); and now, ask this Honorable Court to resolve:

Question: Are the Debtor-Appellants, in fact, legally in bankruptcy proceedings?

Relief Sought: The requirements of Section 322 of Pub.L. 99-353, July 10, 1984, Section 283(aa) of Pub.L. 99-554, October 27, 1986, F.R.Civ.P. 11 and Bankruptcy Rule 9011 should not be disregarded as mere oversight or technical error and appropriate sanctions should be imposed on both the Debtor-Appellants' previous attorney, Alfred Lawrence Toombs, and the Clerk of the United States Bankruptcy Court; and in the alternative, Debtors-Appellants request the Court to dismiss this Chapter 11 proceeding immediately, retroactively dating the order to December 10, 1986.

If this Court finds that the Kearings are not, indeed, legally in bankruptcy proceedings, the following questions and relief sought are moot. If the Court finds that the Kearings are under the jurisdiction of the Bankruptcy Court for the District of Columbia, then the following questions and relief sought are most pertinent.

Question: Has the United States Trustee complied with his duties in this proceeding by failing to appoint a committee of unsecured creditors as required by 11 U.S.C. 1102(a)(1), regardless of whether or not any could or would serve?

Relief Sought: Order an immediate appointment of a committee of unsecured creditors.

Question: Has the United States Trustee complied with his duties in this proceeding, pursuant to 28 U.S.C. 586(a)(3)(A), by failing to monitor applications for compensation and reimbursements filed under 11 U.S.C. 330?

Relief Sought: Order an immediate investigation into the fees paid to, and

applications for additional fees by, the Kearings' previous attorney, Alfred Lawrence Toombs.

Question: Has the United States Trustee complied with his duties in this proceeding, pursuant to 28 U.S.C. 586(a)(3)(B), by failing to monitor Debtors-Appellants' plan of reorganization and to ascertain why no disclosure statement has been filed?

Relief Sought: Order an immediate investigation into the Debtors-Appellants' plan of reorganization; discern why no disclosure statement has been filed; and why this case has come to a complete stop save the appointed trustee's selling or giving away the assets of the Kearings' estate, all the while incurring enormous capital gains and depreciation (recapture) tax liabilities [Approximately $504,373 .10 to date. Total tax against the estate may exceed $742,000.00 if the Bankruptcy Court allows the Van Ness Street property to be sold according to the dictates of the appointed trustee].

Question: Has the United States Trustee complied with his duties in this proceeding, pursuant to 28 U.S.C. 586(a)(3)(F), by failing to notify the appropriate United States Attorney of matters which may constitute a crime under the laws of the United States?

Relief Sought: Order an immediate investigation into the fees allowed or applied for under 11 U.S.C. 326, 328, 329, 330, and Rule 2016 of the Rules of Bankruptcy Procedure; obtain under Rule 2013 of the Rules of Bankruptcy Procedure

the records of this appointed trustee and other trustees serving in this District.

Question: Has the United States Trustee complied with his duties in this proceeding, pursuant to 28 U.S.C. 586(a)(3)(G), by failing to monitor the progress of this case?

Relief Sought: Order the United States Trustee to diligently investigate and answer the Kearings' legitimate queries concerning the status of this case without such nebulous answers as, "I hear where you're coming from, Mrs. Kearing;" and to assure that all officers of the Court are adhering to the Code of Professional Conduct as determined by In re Smith, 5 B.R. 92 (Bkrtcy. D. DC 1982).

Question: Did this Court fully understand all the ramifications of the Kearings' petition for the "emergency petition for a writ of mandamus" to acquire from the Clerk of the Bankruptcy Court the records of trustees and their financial dealings with professionals hired by them in this District?

Relief Sought: Issue the writ of mandamus.

Question: Has the Clerk of the Bankruptcy Court for the District of Columbia performed his duties under Rule 9011 and 2013 of the Rules of Bankruptcy Procedure?

Relief Sought: Issue the writ of mandamus as the Kearings petitioned for and order the voluntary petition of the Kearings stricken.

Question: Have the Kearings, as debtors-in- possession, complied with their fiduciary duties in this proceeding?

Relief Sought: Order declaring that a vacancy of the trustee's office has existed since December 20, 1987 (5 days after trustee appointment); removal of the individual currently acting as appointed trustee whether or not his capacity is "de facto" or "de jure"; reinstatement of the Kearings as debtors-in- possession since the Bankruptcy Court sent no notice and held no hearing as required by 11 U.S.C. 1102, received no testimony, entered no evidence, neither analyzed nor weighed any cost/benefits or cost/protection for appointment of a trustee, found "cause" even though there had been no fraud, dishonesty, incompetence or gross mismanagement on the part of the Debtors-Appellants and that the expense and inconvenience of a trustee was, and is, an adverse factor to successful reorganization of the Debtors-Appellants.

Question: Why was an examiner not appointed in this proceeding as requested under 11 U.S.C. 1104(b)(1) by the Kearings' application for an expedited hearing for appointment of an examiner?

Relief Sought: Order notice and hearing on the Kearings' expedited application for appointment of an examiner pursuant to 11 U.S.C. 1104(b)(1).

Question: Was the appointment of a trustee in this proceeding inappropriate?
Relief Sought: Order notice and hearing on the Kearings' application for an expedited hearing for appointment of an

examiner [above]; and in the alternative, order notice and hearing on motion for appointment of trustee as mandated by 11 U.S.C. 1102.

The following questions are from the order of April 23, 1988, of the Bankruptcy Court "approving agreement in settlement of motions seeking relief from stay, compromising mutual claims and authorizing trustee to execute deeds in lieu of foreclosure as to Unit 201, Unit 502 and Unit 504, 4444 Connecticut Avenue, Washington, D. C."

The relief sought is to find that this order is null and void.

Question: Is this order "interlocutory" or "final" under 28 U.S.C. 158(a)?

Question: Were the findings of fact by the Bankruptcy Court clearly erroneous under Rule 8013 of the Rules of Bankruptcy Procedure?

Question: Did Standard Federal, in seeking relief from the stay, meet the two-prong burden of proof test under 11 U.S.C. 362(d)(2) and (g)(1) since the Kearings have equity in the collateral and the collateral is necessary for an effective

reorganization?

Question: Did Standard Federal have adequate protection; and in the alternative, should relief been granted from the stay due to:

(1) continuation of stay resulting in undue risk of material harm;

(2) no reasonable possibility of reorganization;

(3) property not needed for reorganization;

(4) no equity in the property for benefit of debtor or creditors?

Question: Did Standard Federal have any problem resulting from Article 9 of the Uniform Commercial Code in that Standard Federal had no claim which could be lost in cash proceeds being commingled -- assuming that Standard Federal under Article 9-306 had a perfected security interest in any proceeds of the Kearings to begin with?

Question: Was this issue a "core" proceeding or a proceeding "related to" this Title 11 case?

Question: Will this transfer of property in the Bankruptcy Court pass muster when tested against the criteria set forth in the United States Supreme Court decision in the Northern Pipeline case, which provides that when controversy arises out of state law, it may only be adjudicated, with the federal system, by an Article III court; and Article I judges have no subject matter jurisdiction in this proceeding?

Question: Should the Bankruptcy Judge, under 28 U.S.C. §157(b)(3), have

determined, on the judge's own motion or on timely motion of a party, whether this proceeding was a "core" proceeding under 28 U.S.C. 157; or is a "related" proceeding and was heard as a "non-core," related proceeding, wherein proposed findings of fact and conclusions of law should have been submitted to the district court pursuant to 28 U.S.C. 157(c)(1)?

Question: Should either 28 U.S.C. 1334(c)(2) [mandatory abstention] or 28 U.S.C. 1334(c)(1) [voluntary abstention] have been invoked in this proceeding?

Question: Does an appointed, but unqualified trustee, whether "de facto" or not, have the unmitigated right to transfer property under 11 U.S.C. 363 in this proceeding?

Question: Is Standard Federal protected by 11 U.S.C. 363(m) in that reversal or modification of an appeal of the sale or lease of property authorized under the Bankruptcy Code does not affect the validity of a sale under such authorization to an entity that purchased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization was stayed pending appeal even though the 9th Circuit Court of Appeals has "carved out a narrow exception to this rule, where real property is sold to a creditor who is a party to the appeal" and where "it would not be impossible for the Court to fashion some sort of relief"? See In re Sun Valley Ranches, Inc., 823 F.2d 1373 (9th Cir. 1987) at page 1375, since Standard Federal found use of this cite to defend the "mootness" issue of this transfer but

failed to continue to the very next paragraph below their quote which then proceeds to state the "exception" ruling which noted "a narrow exception to this rule, where real property is sold to a creditor who is a party to the appeal" and where "it would not be impossible for the Court to fashion some sort of relief"?

Dated: January 29, 1990

/s/ Leon R. Kearing
LEON R. KEARING, Pro Se

/s/ Shirley M. Kearing
SHIRLEY M. KEARING, Pro Se

(4)

90-1217

Supreme Court, U.S.
FILED
JAN 28 1991
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1990

Shirley M. Kearing,
Petitioner,

v.

The Honorable S. Martin Teel, Jr., et al,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
For the District of Columbia

APPENDIX C
DISTRICT COURT

Shirley M. Kearing, Pro Se
For the Petitioner
4200 Cathedral Avenue, N.W.
Washington, D.C. 20016
(202) 244-6198

FILED JUNE 4, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In Re:	:	
	:	
LEON R. AND	:	
SHIRLEY M. KEARING,	:	Mis. No. 89-224
	:	(Bankruptcy No.
	:	86-00913)
Debtors.	:	

ORDER

Upon consideration of the Trustee John Guinee, Jr.'s Emergency Motion for Issuance of Order of Incarceration, the opposition thereto, and the entire record herein, and for the reasons stated today in open court, it is hereby

ORDERED that Leon R. Kearing and Shirley M. Kearing (the debtors) shall not take any action, or cause any other person to take any action, individually or jointly, of any kind to interfere with the Trustee's efforts to the sell [sic] the property located at 4801 Van Ness Street, N.W., Washington, D.C., including, but not

limited to, telephoning, contacting, writing or communicating in any way with any real estate agent or prospective purchaser about any matter whatsoever; and it is further

ORDERED that Leon R. Kearing and Shirley M. Kearing shall not take any action or cause any olther person to take any action, individually or jointly, to telephone, contact, write or communicate with the Trustee or his agents about any aspect of the sale of the property, the existence of a pending appeal before the United States Court of Appeals for the District of Columbia Circuit (89-7211), or the debtors' concerns; and it is further

ORDERED that Leon R. Kearing and Shirley M. Kearing (the debtors) shall not go within 100 yards of the property located at 4801 Van Ness Street, N.W., Washington, D.C., or within 100 yards of the residence

or office of any prospective purchaser or any real estate agent involved in the sale of the property at 4801 Van Ness Street, N.W.; and it is further

ORDERED that if either of the debtors violates this Order or the Consent Order of October 31, 1989, entered by the Honorable Thomas P. Jackson of this Court, then upon the affidavit of the Trustee, he or she shall be arrested and incarcerated until he or she demonstrates a plan of cooperation completely satisfactory to the Court.

/s/ Gerhard A. Gesell
UNITED STATES DISTRICT JUDGE

June 4, 1990

FILED JUNE 1, 1990

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In Re:	:	
	:	
LEON R. AND	:	
SHIRLEY M KEARING,	:	Mis. No. 89-224
	:	(Bankruptcy No.
	:	86-00913)
Debtors.	:	

OPPOSITION TO EMERGENCY MOTION FOR ISSUANCE OF ORDER OF INCARCERATION

Comes now the Debtor herein, Shirley M. Kearing, by an through her counsel, John Parazich, Esquire, and for her opposition to Emergency Motion for Order of Incarceration states as follows:

(1) The Trustee alleges that the Debtor is "in violation" of Judge Jackson's Order of October 30, 1989, which precludes the Debtor and her husband from interfering with the Trustee's effort to sell certain real property and requiring the Debtors to cooperate with the Trustee with respect to such sale. The Debtor assumes the pending

Motion to be in the nature of a rule to show cause as to why she should not be held in contempt and so responds.

(2) While movant alleges that the Debtor "threatened to obstruct the sale ..." (paragraph 3) with respect to one witness and exhibited "similar threatening intent" (paragraph 4) with respect to another, movant fails to allege, much less to establish through affidavits, that the Debtor has interferred, either directly or indirectly with the Trustee's efforts to sell the property or that the Debtor has failed to cooperate with the Trustee in the seven months which have passed since the Order was issued.

(3) Assuming, arguendo, the accuracy of the quotes attributed to the Debtor in paragraph 4 of Exhibit C and in paragraph 3 of Exhibit D, the "interpretations" of these words, when considered in the context

of the totality of circumstances surrounding this matter, as set forth in paragraph 5 of Exhibit C and paragraph 5 of Exhibit D, are flights of fancy which go far beyond the ordinary meanings of the words used.

(4) An explanation of the Debtor's actions is set forth in greater detail in her Affidavit attached hereto as Exhibit A.

WHEREFORE, Debtor respectfully requests that this Motion be denied and that she be awarded costs and attorney's fees attendant to this proceeding.

Respectfully submitted,

/s/ John Perazich

John Perazich, Esquire, #27144
PERAZICH AND WYNN
1201 Connecticut Avenue, N. W.
Suite 750
Washington, D. C. 20036
(202) 331-7530

FILED JUNE 1, 1990

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In Re	)	
	)	
LEON R. AND	)	Misc. No. 89-224
SHIRLEY M. KEARING,	)	(Bankruptcy No.
	)	86-00913)
Debtors	)	

AFFIDAVIT OF SHIRLEY M. KEARING

I, Shirley Kearing, being first duly sworn under oath, deposes and states as follows:

1. Since this Court's Order of October 30, 1989, to my recollection, I have had no contact with either the Trustee, John W. Guinee, Jr. or the real estate broker, Jeannne Sears, regarding the sale of 4801 Van Ness Street, N.W. with the exception of the contacts described in paragraphs 3, 4 and 5 infra.

2. The Affidavit of Hoyun Kim (Exhibit B), reflects that on May 25, 1990, he mailed to me certain documents. Upon

review of those documents, it seemed to me that the contract purchasers had not been notified of the fact that my husband and I have pending in the United States Court of Appeals for the District of Columbia Circuit, a case (No.89-7211), which I understand to be a "cloud" affecting the proposed sale.

3. The Affidavit of Jeanne Sears (Exhibit C), reflects that on May 26, I called her and left a message on her answering machine requesting that Ms. Sears provide me with the phone number of the contract purchasers of 4801 Van Ness Street, Jose M. Alonso Biarge and Maria-Jose Escardin. Notwithstanding Ms. Sears' "interpretation" of the purpose of my call, my intent was to make the buyers aware of the litigation which I reference in paragraph 2. supra and, by my words, I did not threaten her nor intend to threaten

her.

4. On May 26, 1990, I called and spoke with the Trustee, John Guinee, Jr., for the purpose of conveying to him the information referenced in paragraphs 2. and 3. supra. During the course of that conversation, Mr. Guinee threatened me by stating that "Elizabeth Morgan's cell is waiting for you!"

5. The Affidavit of John Guinee, Jr. (Exhibit D) reflects that on either May 26 or May 27 I called him and left a message on his answering machine which was no more than an expression of frustration my husband and I feel as a result of our current situation. By my words, I did not threaten nor intend to threaten Mr. Guinee.

6. I have not contacted nor have I attempted to contact the contract purchasers herein.

7. Since October 30, 1989, I have not

interfered, directly or indirectly, with the Trustee's efforts to sell the property in issue nor have I been uncooperative in that regard.

8. Further Affiant saith not.

/s/ Shirley M. Kearing
SHIRLEY KEARING

FILED MAY 31, 1990

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In Re	)	
	)	
LEON R. AND	)	Misc. No. 89-224
SHIRLEY M. KEARING,	)	(Bankruptcy No.
	)	86-00913)
Debtors	)	

AFFIDAVIT OF JEANNE SEARS

I, JEANNE SEARS, hereby declare as follows:

1. I am an agent of Coldwell Banker Real Estate ("Coldwell Banker"), a licensed District of Columbia real estate broker, with offices at 4801 Wisconsin Avenue, N. W., Washington, D. C. 20016.

2. The following statements are based on my own knowledge.

3. Coldwell Banker was retained by Trustee John W. Guinee, Jr., to market the real property at 4801 Van Ness Street, N.W., Washington, D. C., (the"Property").

4. On Saturday, May 26, a message was

left on the answering machine at my home as follows: "My name is Shirley Kearing and the real property located at 4801 Van Ness Street, Washington, D.C. is not for sale. The trustee has entered into a contract to seel the property with you and I want to know the telephone number of Jose M. Alonso Biarge and Maria-Jose Escardin because I want to call them and tell them they are not innocent third parties. Now please return my call 244-61 [at this point, the machine cut off the message]."

5. I interpreted the telephone call as an effort by Mrs. Kearing to stop the sale. The call has been very upsetting to my family and me.

6. In my professional opinion, if Mrs. Kearing contacts the purchasers of the property, they will not want to go through with the purchase of the Van Ness property and the sale will be lost.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Jeanne Sears
Jeanne Sears

FILED JANUARY 22, 1990
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHIRLEY M. KEARING 4200 Cathedral Avenue, N. W. Apartment 915 Washington, D. C. 20016 (202) 244-6198 PLAINTIFF,	
vs.	Civil Action No. 89-2837 (GAG)
The Honorable S. Martin Teel, Jr. Bankruptcy Judge United States Bankruptcy Court for the District of Columbia Room 2106 3rd Street & Constitution Avenue, N. W. Washington, D. C. 20001 and Martin L. Bloom Clerk United States Bankruptcy Court for the District of Columbia Room 2400 3rd Street & Constitution Avenue, N. W. Washington, D. C. 20001	

and

John W. Guinee, Jr.
1514 Inlet Court
Reston, Virginia 22090

and

Peter R. Kolker, Esq.
1201 Connecticut
Avenue, N. W.
Washington, D. C. 20036

and

Renee Franklin Hill, Esq.
Office of Bar Counsel
Board on
Professional Responsibility
District of Columbia
Court of Appeals
515 5th Street, N. W.
Building A
Washington, D. C. 20001

and

The Law Firm of Zuckerman,
Spaeder, Goldstein,
Taylor & Kolker
1201 Connecticut
Avenue, N. W.
Washington, D. C. 20036

and

Dennis Early, Esq.
Office of the
United States Trustee
421 King Street
Alexandria, Virginia 22314

and

John Waites, Esq.
United States Trustee
421 King Street
Alexandria, VA 22314

and

Herbert M. Rutherford, III
United States Marshal for
the District of Columbia
Room 2419
3rd Street &
Constitution Avenue, N. W.
Washington, D. C. 20001

and

J. Neely, Deputy
Office of the
United States Marshal for
the District of Columbia
Room 2419
3rd Street &
Constitution Avenue, N. W.
Washington, D. C. 20001

and

V. Kerr, Deputy
Office of the
United States Marshal for
the District of Columbia
Room 2419
3rd Street &
Constitution Avenue, N. W.
Washington, D. C. 20001

and

P. Link, Deputy)
Office of the)
United States Marshal for)
the District of Columbia)
Room 2419)
3rd Street &)
Constitution Avenue, N. W.)
Washington, D. C. 20001)
)
DEFENDANTS.)

AMENDMENT TO ~~(ILLEGAL ARREST)~~ COMPLAINT FOR DAMAGES

1. This Court has jurisdiction pursuant to the United States Constution, Amendment V, and 42 U.S.C.A. 1983.

2. Plaintiff is an adult citizen of the United States and a resident of the District of Columbia.

3. On or about October 14, 1988, at 3:15 p.m., under "color of law" the above named defendants, through malfeasance, misfeasance and nonfeasance of duty, did cause a tortious act by violating plaintiff's guaranteed fundamental protection of due process of law by consummating an illegal arrest and incarceration of the above-named plaintiff

in blatant and malicious use of process in direct violation of the Constitution of the United States of America.

4. In the original Complaint for Damages (Illegal Arrest), the Plaintiff unintentionally omitted the United States Marshal for the District of Columbia, Herbert M. Rutherford, III, and his deputies, J. Neely, V. Kerr and P. Link.

WHEREFORE, the premises considered, the plaintiff hereby respectively requests:

(a) That her original complaint be amended to include the above-named defendants; and

(b) That her demand for judgment against all defendants be amended from the original amount of TWENTY-NINE MILLION DOLLARS ($29,000,000.00) to include further exemplary damages of FIVE MILLION DOLLARS ($5,000,000.00) for

a total amount of THIRTY- FOUR MILLION DOLLARS ($34,000,000.00).

Plaintiff Demands Trial by Jury.

/s/ Shirley M. Kearing
SHIRLEY M. KEARING, Plaintiff

FILED OCTOBER 31, 1989
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In Re	)	
	)	
LEON R. AND	)	Misc. No. 89-224
SHIRLEY M. KEARING,	)	[Bankruptcy Case
Debtors	)	No. 86-00913]

ORDER

Upon the consent of the Trustee and of the debtors, Leon and Shirley Kearing, and it appearing to the Court that a factual basis has been established for finding the debtors in contempt, in that the debtors have wilfully and intentionally prevented the Trustee (including his agents) from selling the property located at 4801 Van Ness Street, N.W., Washington, D.C., the Court makes the following:

FINDINGS OF FACT

(1) The debtors Leon and Shirley Kearing are hereby found to be in contempt of the Bankruptcy Court's Order of April 23, 1988 in that they have interfered with

the Trustee's efforts to sell the property by posting notices on the property, ~~changing~~ tampering with [previous underline is handwritten insertion initialed by SK and LRK] the locks on the property and taking occupancy of the property all without the approval of the Trustee and in direct contravention of the Trustee's express directions;

Therefore the Court reaches the following:

CONCLUSIONS OF LAW

(1) Debtors Leon and Shirley Kearing be and they hereby are found to be in contempt of the order of April 23, 1988 entered by the Bankruptcy Court.

In consideration whereof, the Court enters the following

ORDER

That the Debtors shall remove all articles they have placed in the property

by entering upon the property with and only with the consent of the Trustee or his designated agent and the debtors shall take no action of any kind to interfere with the Trustee's efforts to sell the Property, and if the debtors fail to cooperate with the Trustee, then, upon the Affidavit of the Trustee reflecting such non-cooperation with his efforts to sell the Property, the debtors shall be arrested and incarcerated until they demonstrate a plan of cooperation completely satisfactory to this court ; provided however that a copy of the said Affidavit of the Trustee is served upon counsel for the Debtors and Debtors within seventy-two (72) hours from service of the said Affidavit or such additional time as this Court may provide by further order fail to show cause why they should not be arrested and incarcerated.

[previous underline is handwritten insertion initialed by SK and LRK]

/s/ Thomas Penfield Jackson
United States District Judge

Date: 10/30/89

We consent to the foregoing:

/s/ Shirley Kearing
Shirley Kearing

./s/ Leon Kearing, M.D. 10/31/89
Leon R. Kearing

FILED OCTOBER 17, 1989
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In Re	)	
	)	
LEON R. AND	)	Misc. No. 89-224
SHIRLEY M. KEARING,	)	[Bankruptcy Case
Debtors	)	No. 86-00913]

ORDER TO SHOW CAUSE

Upon consideration of the Emergency Motion of the Trustee for Issuance of an Order to Show Cause, and the record in support thereof, it is this 17th day of October, 1989,

ORDERED, that the motion is granted; and it is

FURTHER ORDERED, that Shirley M. Kearing appear in person before this Court on the 30th day of October, 1989, at 10:00 a.m., and show cause, if any there be, why she should not be held in criminal and/or civil contempt as prayed, failing which a bench warrant shall issue for her arrest; and it is

FURTHER ORDERED, that on or before the 30th day of October, 1989, Leon R. Kearing show cause in writing filed herein why he should not be held in civil contempt a prayed; and it is

FURTHER ORDERED, that the U.S. Marshal cause a copy of this Order to Show Cause to be served personally on Shirley M. Kearing, in addition to any appropriate substituted service, but failure to effect such personal service shall not affect the validity hereof.

/s/ Thomas Penfield Jackson
Thomas Penfield Jackson
U.S. District Judge

FILED JANUARY 22, 1990
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHIRLEY M. KEARING
4200 Cathedral Avenue, N. W.
Apartment 915
Washington, D. C. 20016

(202) 244-6198

PLAINTIFF,

vs.

Civil Action
No. 89-2837
(GAG)

The Honorable
S. Martin Teel, Jr.
Bankruptcy Judge
United States
Bankruptcy Court for
the District of Columbia
Room 2106
3rd Street &
Constitution Avenue, N. W.
Washington, D. C. 20001

and

Martin L. Bloom
Clerk
United States
Bankruptcy Court for
the District of Columbia
Room 2400
3rd Street &
Constitution Avenue, N. W.
Washington, D. C. 20001

and

John W. Guinee, Jr.
1514 Inlet Court
Reston, Virginia 22090

and

Peter R. Kolker, Esq.
1201 Connecticut
Avenue, N. W.
Washington, D. C. 20036

and

Renee Franklin Hill, Esq.
Office of Bar Counsel
Board on
Professional Responsibility
District of Columbia
Court of Appeals
515 5th Street, N. W.
Building A
Washington, D. C. 20001

and

The Law Firm of Zuckerman,
Spaeder, Goldstein,
Taylor & Kolker
1201 Connecticut
Avenue, N. W.
Washington, D. C. 20036

and

Dennis Early, Esq.
Office of the
United States Trustee
421 King Street
Alexandria, Virginia 22314

and

John Waites, Esq.
United States Trustee
421 King Street
Alexandria, VA 22314

Defendants.

COMPLAINT FOR DAMAGES (ILLEGAL ARREST)

1. This Court has jurisdiction pursuant to thc United States Constution, Amendment V, and 42 U.S.C.A. 1983.

2. Plaintiff is an adult citizen of the United States and a resident of the District of Columbia.

3. On or about October 14, 1988, at 3:15 p.m., under "color of law" the above named defendants, through malfeasance, misfeasance and nonfeasance of duty, did cause a tortious act by violating plaintiff's guaranteed fundamental protection of due process of law by consummating an illegal arrest and incarceration of the above-named plaintiff in blatant and malicious use of process in

direct violation of the Constitution of the United States of America.

WHEREFORE, the premises considered, the plaintiff demands judgment against the above-named defendants in the amount of TWENTY-NINE MILLION DOLLARS ($29,000,000.00).

Plaintiff Demands Trial by Jury.

/s/ Shirley M. Kearing
SHIRLEY M. KEARING, Plaintiff

FILED AUGUST 2, 1989
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In Re	)	
	)	
LEON R. AND	)	Civil Action
SHIRLEY M. KEARING,	)	No. 88-1232
Debtors	)	

ORDER

It appearing that the Bankruptcy Court has failed to make the certification contemplated by D.D.C. Rule 604(c) as to various interlocutory rulings sought to be appealed, and that the single final ruling is now moot, it is, this 2nd day of August, 1989,

ORDERED, that the debtors' motion for leave to appeal is denied; and it is

FURTHER ORDERED, that this action is dismissed with prejudice.

/s/ Thomas Penfield Jackson
Thomas Penfield Jackson
U.S. District Judge

FILED AUGUST 2, 1989

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In Re	)	
	)	
LEON R. AND	)	Civil Action
SHIRLEY M. KEARING,	)	No. 88-1232
Debtors	)	

MEMORANDUM AND ORDER

This case is presently before the Court on an appeal from an adjudication by the U.S. Bankruptcy Court of civil contempt of Shirley M. Kearing, a debtor in possession.

On April 23, 1988, the Bankruptcy Court entered an order directing the debtor, Shirley M. Kearing, to "cooperate" with the Trustee in endeavoring to sell real property belonging to the estate, to turn over rents she had collected, and to provide the Trustee with copies of banking records. On the same date, Ms. Kearing attempted an appeal of certain earlier orders of the Bankruptcy Court, including its appointment of the Trustee, as well as

the order of April 23rd.

On August 11, 1988, this Court, deeming the appeal to relate to interlocutory rulings of the Bankruptcy Court, treated Ms. Kearing's notice of appeal as a motion for leave to appeal, and stayed all appellate proceedings before it, pending a determination by the Bankruptcy Court as to whether a controlling question of law was presented.[1]

The Bankruptcy Court did not make the required certification, but Ms. Kearing nevertheless failed to comply with the order of April 23rd. Accordingly, upon the Trustee's motion, on June 30, 1988, the Bankruptcy Court issued an order to Ms. Kearing to show cause why she should not be held in contempt of court. Following a

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[1] This Court had previously denied, on July 8, 1988, Ms. Kearing's "emergency motion" for a stay of "all judgments, orders, decrees and for all other relief" pending appeal.

hearing on September 20, 1988, the Bankruptcy Court entered an order of contempt on September 29, 1988, holding Ms. Kearing in contempt. This appeal, as to which no certification is necessary, followed.

The only assignment of error is Ms. Kearing's contention that this Court's Order of August 11, 1988, operated to stay all proceedings in both courts. Hence, she argues, the Bankruptcy Court was without power to hold her in contempt.

Ms. Kearing, however, misapprehends the effect of the August 11th order. It expressly states that "all further proceedings with respect to this appeal are stayed" pending the Bankruptcy Court's certification, which has not been forthcoming. The underlying Chapter 11 case in the Bankruptcy Court has at all times remained active, and remains so

today.

No other error appearing from the record, the Bankruptcy Court's Findings of Fact and Conclusions of Law, and its Order of Contempt of September 29, 1988, are this 2nd day of August, 1989, affirmed.

/s/ Thomas Penfield Jackson
Thomas Penfield Jackson
U.S. District Judge

FILED MARCH 29, 1988
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In re	:	Civil No. 88-1232
	:	JACKSON, J.
LEON R. AND	:	----------
SHIRLEY M. KEARING,	:	Bankruptcy No.
	:	86-00913
Debtors.	:	(Chapter 11)

BRIEF ON BEHALF OF SHIRLEY M. KEARING

Issues Presented

1. Whether the District Court's order that "... all further proceedings with respect to this appeal are stayed pending submission of the Bankruptcy Judge's written certification ..." together with Bankruptcy Rule 8005, required the Bankruptcy Judge to protect the rights of the debtor in the issues pending?

2. Whether Shirley Kearing, debtor, was reasonably fearful that cooperation with the "trustee," then being coerced by the bankruptcy judge's threatened contempt order, would enable the trustee to sell her home to a third party and thereby make her appeal moot while it awaited the Bankruptcy Judge's certification?

Statement of Facts

On April 21, 1988, debtors filed a Notice of Appeal to the District Court from the Bankruptcy Court in Bankruptcy No. 86-00913.

Four days later, on April 25, 1988, the Bankruptcy Court in that case entered an order requiring that debtors

> [M]ake available for inspection the real property owned by said Debtors, including 4801 Van Ness St. ... by the Trustee and/or an agent ... at 12 noon to 5:00 p.m. on Sunday, as reasonably necessary to determine the marketability of the home, at a time to be fixed in writing delivered to Debtors' home by 13 hours in advance or by telephone 3 hours in advance and it is further
>
> ORDERED that the Debtors cooperate with the Trustee and his agent(s) in an effort to obtain offers to purchase the real property designated above [etc.]

On August 3, 1988, debtors filed in this Court their 30-page Motion for Leave to Appeal, as an extension of their earlier "Notice of Appeal." They questioned, among other things, the propriety and legality of the appointment of the Trustee by the

Bankruptcy Court. [pages 24 and 25].

> On August 12, 1986, the District Court ordered: [A] written certification stating whether, in the Bankruptcy Judge's opinion, and after considering the motion for leave to appeal and the answers thereto, the interlocutory orders appealed involve a "controlling question of law as to which there is a substantial ground for difference of opinion and whether an immediate appeal from the order[s] may materially advance the ultimate termination of the case ....

On January 6, 1989, the Bankruptcy Judge filed his certification in response to the August 3rd Order of the District Court.

In the meantime, on June 30, 1988, the Bankruptcy Court, on the motion of the trustee, issued an Order to debtors to "show cause why they should not be punished for civil contempt of court because of their misconduct in failing to obey, comply and carry out the provisions of the order [of April 25, 1988]."

On September 14, 1988, the Bankruptcy Court appointed counsel to defend Shirley

Kearing of the contempt charge, and held the hearing on September 20, 1988.

At the hearing of September 20, 1988, counsel for Mrs. Kearing advised the Bankruptcy Judge of Mrs. Kearing's conviction that the District Court Order of August 12 stayed these proceedings, and that she had sought clarification by attempting to file an application for a stay of these proceedings but it was not received because of the stay itself. [T12-14].

Kearing's counsel also advised the Bankruptcy Judge of Mrs. Kearing's relating of her previous experience where a previous appeal was mooted by the Trustee's hasty transfer of the deed shortly before the scheduled hearing which effectively deprived her of any appellate protection on that issue; and her continued fear that if she cooperates with the Trustee's attempt

to sell her home she will be faced with a fait accompli when she asks for review. [T.14].

Neither the Bankruptcy Court nor the Trustee responded to Mrs. Kearing's fears. She was held in contempt by the proposed Order.

ARGUMENT

It is apparantly a reality that important rights to appellate review might be lost by a transfer pending appeal. But is also the duty of teh Bankruptcy Judge expressed in Bankruptcy Rule 8005 to protect the rights of the parties pending appeal. That Rule States "[T]he bankruptcy judge may suspend or order the continuation of other proceedings in the case under the Code or make any other appropriate order during the pendency of an appeal on such terms as will protect the rights of all parties in interest." (underscoring

supplied) (Id.). The rule could have been written to omit the word "other" before proceedings, which would have given the Bankruptcy Judge unlimited discretion. We submit that the use of "other" before "proceedings" implies that the Bankruptcy Judge should not proceed on the issues then pending in a manner which would jeopardize the rights of the aprties. While it is true that the Bankruptcy Judge had not yet ordered or approved a specific sale of the Kearings' home, the Mrs. Kearing had a fear founded on experience that if they obeyed the Order by cooperating in the sale of their home there important right to appellate review would become meaningless.

This Bankruptcy Rule read in conjunction with Judge Jackson's Order that "[A]ll furhter proceedings with respect to this appeal are stayed pending ... certification" would seem to indicate that

those issues pending review are to be preserved and no action taken which would prejudice the parties' right to that review.

Unfortunately for Mrs. Kearing she had experienced that loss of the right to review in connection with the earlier sale of other real estate which she opposed. That deed was recorded hours before her appeal was to have been heard, making it moot.

The suggestion of appointed counsel before the Judge below, made at the commencement of the contempt hearing, that the proceedings should be stayed in view of Judge Jackson's order was to no avail. Clearly it would have been an exercise in futility to formally move for a stay as is shown by the later denial of such a motion formally made immediately before Mrs. Kearing's objections to the proposed

contempt order.

It does appear that the debtors have a substantial issue which they are attempting to preserve on appeal:

Debtors discharged their original attorney when it appeared that legal fees and taxes incurred by the bankruptcy sale of several real estate parcels was eating up so much of their cushion that they would lose their home as well, and that instead of the re-organization under Chapter 11 originally contemplated, they would have nothing left other than the statutory exemption and their creditors would be left with little or nothing.

Debtors were acting thereafter pro se. The bankruptcy Judge, on November 6, 1988, threatened to appoint a trustee if they did not secure an attorney for the estate within thirty days from the entry of that Order. On November 12, 1988, Notice of the

Order was mailed by the Clerk. On November 7, 1988, the debtors in possession filed a handwritten application for leave to hire attorney (Huffstetler) who apparantly had offered to act as attorney for the estate without fee, but the bankruptcy Judge, by Order of December 9th appointed the trustee and on the following December 31st the bankruptcy Judge denied the application of debtors made through attorney Huffstetler for the removal of the trustee. The bankruptcy Judge explicitly refused to appoint attorney Huffstetler on the grounds that Mr. Huffstetler (who was an active practicing attorney and certified public accountant but with little or no experience in bankruptcy) was not qualified by experience, and as a nephew by marriage he was disqualified as an "insider," citing U. S. Code 11-§327(a).

But § 327(a) is not applicable to the

case at bar. In In re Covey, 57 B.R. 665 (Bkrtcy. D.S.D. 1986) it was pointed out that § 327(a) applied only to trustees not to debtors in possession as is the case here. Covey approved of a nephew-attorney acting as attorney for the debtors in possession saying:

> The trustee is required to be aloof from all connection with the debtor and its management. To require less of the trustee's attorney, who would be active in furthering the trustee's duties, would be illogical. The debtor-in-possession, however, is certainly not aloof from the debtor nor the management of the estate -- the debtor-in-possession is the debtor, managing the estate. Other facts take on more importance as a result, such as an attorney's familiarity with the affairs of the debtor and a debtor's confidence in overly rigid, mechanical application of the standards to the debtor-in-possession would serve no one's best interests. (emphasis in original) (Id. at 666).

The same result was reached in In re Heatron, Inc., 5 B.R. 703 (Bkrtcy WD MO 1980); and In re O'Connor, 52 B.R. 892 (Bkrtcy. WD OK 1985).

The trustee, having been appointed, has now retained counsel. Instead of having a single attorney working pro bono with the full confidence and cooperation of the debtor in possession there is now an attorney charging as much or more than the original attorney, plus a trustee, all to be paid from the estate and ultimately from the creditors and debtors, thus thwarting the purpose of the Bankruptcy Act prompted by a mindlessly rigid and mechanical misapplication of the Rules.

CONCLUSION

Mrs. Shirley Kearing was defending her rights in good faith in an honest and conscientious belief that only by doing so could she preserve her home against forced sale, when it appeared to her that there were reasonable alternatvies presented by the employment of her own attorney. There is a sufficient basis therefore in

presenting the issues of the legality of the trustee in the only forum available to her by the means she adopted. She would not therefore be found in contempt.

Respectfully submitted,

/s/ Joseph Zitomer
Joseph Zitomer, Bar # 138925
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Silver Spring, Md., 20910.
(301) 589-1002
Attorney for Shirley M. Kearing

FILED MARCH 27, 1989
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In re	:	Civil No. 88-1232
	:	JACKSON, J.
LEON R. AND	:	----------
SHIRLEY M. KEARING,	:	Bankruptcy No.
	:	86-00913
Debtors.	:	(Chapter 11)

REPLY BRIEF OF SHIRLEY KEARING

The Trustee in his Brief, page 2, notes that Debtors "strenuously objected to the appointment of the Trustee;" that thereafter they "refused to cooperate with the trustee in any manner;" but he omits the fact that the debtors substantially complied with the bankruptcy judge's order of November 7, 1987, that they employ an attorneyh for the estate by December 7th, 1987, or a trustee would be appointed. Neither does the trustee allude to the fact that the bankruptcy judge, instead of holding hearing on the hiring of their attorney, without further notice or

opportunity for hearing appointed the Trustee. The Trustee's assertion of their refusal to cooperate with the trustee is true, but without stating their reasons it is a simple effort to make the debtors appear arbitrary and unreasonable.

While the bankruptcy court undoubtedly had the power " ... to issue any order, process, or judgment that is necessary or appropriate ... [11 U.S. Code, §105, emphasis added] Debtors earnestly and consistently contend now, as they did at the September 20th hearing, that the bankruptcy court did not have the power arbitrarily to appoint the Trustee; that the appointment was therefore invalid and they could not properly be held in contempt for failing to cooperate with his efforts to sell their house, among other things.

As a general rule, the party being held in civil contempt of court is allowed to

challenge the underlying validity of that order. U.S. v. Campbell, 761 F.2d 1181 at 1185 (CCA-6, 1985).

The trustee urges this Court to limit de novo review to a single issue because "Debtors only specifically objected to the finding that the April 25, 1988, Order was ±subject to a motion for leave to appeal but it had not been stayed pending appeal.'"

But Rule 9033 (d) limits objections to the findings or conclusions of the bankruptcy judge and in this instance the bankruptcy judge made no findings or conclusions regarding the legality of the trustee even though it was repeatedly brought home to the judge at the hearing of September 20, 1988.

While it might have been the better and safer practice to make objections to issues not addressed by the bankruptcy judge, the

Rule does not require this. The Rule places the burden on the proponent of the contempt charge to address the issues first and where the issues are presented but not ruled on, this omission should not prejudice the victim.

Nevertheless Debtors in the same documents which make the "specific objections" states among the Grounds for Objection at pages 4 and 5 that the bankruptcy court erroneously refused to appoint their attorney and unnecessarily appointed the Trustee, and cited the same cases which Debtors rely upon in their main brief to this Court. The Trustee cannot claim the issue is a "surprise." There is an unmistakable touch of irony in the fact that the Trustee who enjoyed the benefit of due process which Debtors were denied, now weeks to bar their right to review on procedural grounds alone.

At the contempt hearing of September 20, 1988, Mrs. Kearing testified in pertinent part as follows:

> [TRUSTEE'S ATTORNEY]: Now, Mrs. Kearing, in the course ofthat case, has it come to your attention that an order was issued by this Court on April 23, 1988 requiring you to cooperate with the trustee in certain specific ways?
>
> A. Yes, but I don't believe the trustee is legally appointed and this is why I'm opposing that and I still am opposing it. [Tr. 9/20/88, p. 19].,
>
> * * *
>
> "I do not acknowledge that the trustee is a qualified trustee. As far as I'm concerned, I'm my own debtor in possession. [Tr. 20].
>
> "I do not acknowledge the trustee as being legal." [Tr. 21]
>
> "I do not acknowledge the trustee." [Tr. 22]
>
> "I do not acknowledge the legality of the trustee." [Tr. 22]
>
> "I did not want a trustee appointed. He was appointed, there was no hearing finding me incompetent to be my own debtor in possession, I have not been able to exercise my rights there." [Tr. 23]

"I do not recognize the legality of the trustee. That is one of the major issues that's up in the District Court for appeal." [Tr. 24]

THE COURT: Let me understand your answer. Are you saying that you refuse to cooperate with the trustee in the showing of your residence to prospective purchasers?

THE WITNESS: I'm saying I don't recognize the trustee as a person who can compel me to do this. I have this on appeal.

THE COURT: Listen to the question. Are you saying that you refuse to cooperate with the trustee in showing your residence to prospective purchasers, yes or no?

THE WITNESS: I'm not sure that --

MR. ZITOMER: Your Honor, I think the problem is she has trouble with the word "trustee," since she doesn't recognize the trustee as a trustee ...

Because she takes the position that there is no trustee. Right or wrong, that's her position. I think that's the problem of semantics that we're having. [Tr. 24]

Mrs. Kearing's State of Mind: Scienter

Despite the trustee's argument to the contrary, Debtors' state of mind on the issue of contempt is relevant and material. Whether they had reasonable grounds to believe the proceedings were stayed and

taht they were not in violation of the Bankruptcy Judge's Order requires an inquiry into the issue of scienter.

We submit first that Debtors reasonably believed that this Court's Order staying proceedings applied to the contempt proceedings below and that they stay applied to the proceedings before the Bankruptcy Judge to the extent those proceedings were inconsistent with the issues on appeal.

This belief of Mrs. Kearing was not unreasonable in view of the fact that she had attempted to file in this Court a motion seeking a stay of the bankruptcy contempt proceedings and was informed that "... they would not accept the papers because everything had been stayed ...." [Tr. 14, Sept. 20, 1988]. This belief is reinforced by Bankruptcy Rule 8005, Stay Pending Appeal, which provides that

> the bankruptcy judge may suspend or order the continuation of other proceedings in the case under the Code or make any other appropriate order during the pendency of an appeal on such terms as will protect the rights of all parties in interest. [emphasis supplied]

The Trustee's argument that this Court had previously denied "Debtors' July 1, 1988, Emergency Motion for a Stay ..." [Trustee's Br. p. 9] is misleading. The 14-page transcript of that July 8, 1988, hearing is reproduced as an appendix hereto, and demonstrates that this Court denied the Emergency Application because the Trustee's transfer of the real estate befor3e the hearing rendered it moot, stating "the transactions are a fait accompli ...." [July 8, 1988, Tr. 4, 13]. This ability of the Trustee to thwart the right of meaningful review by this Court is further evidence of Debtors' experience with the bankruptcy court and the Trustee.

If the proceedings below were not stayed by this Court's stay order, they would be faced with a further "fait accompli" in the sale and transfer of their home before this Court could intervene. A continuation of these proceedings in the face of this Court's stay order and Rule 8005 threatened the due process to which Debtors were entitled before their home could be sold out from under them and is therefore within the scope of reasonable, foreseeable conduct.

Finally we not that the Trustee's Brief page 10 alleges erroneously, we submit, taht this "Court denied her Motion for Leave to Appeal at a status call on January 27, 1989." We do not recall that this Court denied their Motion, nor does such a denial appear as a docket entry. We do recall that this Court stated that the bankruptcy judge had not certified their

Motion for Leave to Appeal.

CONCLUSION

Debtors pray that this Court find that the Trustee has not shown by clear and convincing evidence that the Order appointing the Trustee was valid; that Debtors cannot be found in contempt for failure to obey an invalid order; that Trustee has not shown by clear and convincing evidence that Debtors did not have reasonable grounds to believe that these proceedings had been stayed. For the foregoing reasons the citation for contempt should be dismissed.

Respectfully submitted,

/s/ Joseph Zitomer
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(301) 589-1002
Attorney for Shirley M. Kearing

FILED FEBRUARY 13, 1989

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In Re	)	
	)	
LEON R. AND	)	Civil Action
SHIRLEY M. KEARING,	)	No. 88-1232
Debtors	)	

ORDER

Upon consideration of the debtors-appellants' emergency motion for reconsideration of debtors-appellants' petition for a writ of mandamus, and in the alternative, motion for issuance of a show cause order, and debtors-appellants' emergency motion for a stay of all judgments, it is, this 13th day of February, 1989,

ORDERED, that the motions are denied.

/s/ Thomas Penfield Jackson
Thomas Penfield Jackson
U.S. District Judge

FILED JANUARY 19, 1989
UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

In re	:	
	:	Case No. 86-00913
LEON R. AND	:	(Chapter 11)
SHIRLEY M. KEARING,	:	
	:	
Debtors.	:	

ORDER RE TRANSMISSION TO DISTRICT COURT
OF OBJECTIONS TO CONTEMPT RULING

On September 30, 1988, this Court entered an Order of Contempt together with Findings of Fact and Conclusions of Law Re Contempt. Docket Entries ("DE") Nos. 241 and 242. Pursuant to a timely motion, the Court extended the time for Mrs. Kearing to file objections to the contempt ruling to October 24, 1988. DE No. 251. On October 24, 1988, the Debtors filed Debtors' Objections and Requests for De Novo Review and Hearing of the Bankruptcy Judge's Findings of Fact and Conclusions of Law. DE No. 256.

The de novo review procedures of

Bankruptcy Rule 9033 (applicable to matters under 28 U.S.C. § 157(c)(1) are expressly made applicable to contempt matters by Bankruptcy Rule 9020(c). District Court Local Rule 603(b), the local rule governing such de novo review, in turn makes Local Rule 602(d), (e), and (f) applicable to control the mechanics of designation of the record, responses to objections, reply, and transmittal to and proceedings in the District Court.[2]

With respect to the matter of the designation of the record, the Debtors failed to designate any record. The Court will, therefore, assume that the Debtors intend not to rely on anything other than

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[2] However, Local Rule 603(b), instead of Local Rule 602(f), controls the matter of assignment of the objections to a District Court Judge for review.

their objections to the contempt ruling.[3]

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[3] TTe only objection to the contempt ruling is the Debtor's contention that the Bankruptcy Court erred in finding that the Bankruptcy Court's Order of April 25, 1988 had not been stayed by the District Court pending the appeal in Civil Action No. 88-1232 and in thus finding that the Order's violation was a contempt of court. The contention, in the Bankruptcy Court's view, is frivolous and the Bankruptcy Court would respectfully recommend that the objections to the Bankruptcy Court's contempt ruling be ruled upon prior to a ruling on the motion for leave to pursue an interlocutory appeal. If the Bankruptcy Court's contempt ruling is adopted, it may be made subject to vacation at a later date in the event an interlocutory appeal is granted in Civil Action No. 88-1232 and the underlying Order of April 25, 1988 is set aside. See U.S. v. Unite Mine Workers, 330 U.S. 258, 295 (1947) (civil contempt order does not survive reversal of violated injunction that gave rise to contempt order).

Unless the appellate court stays a contempt order pending the appeal of the order violated, the contempt order remains enforceable. Matter of Campbell, 761 F.2d 1181, 1186 (6th Cir. 1985). In this Court's view, the minimal likelihood of success on appeal of the Order of April 25, 1988, warrants the District Court's adoption of the contempt order without awaiting final determination of the motion of leave to appeal the April 25, 1988 order in Civil Action No. 88-1232 The Trustee ought to be allowed to get about his business of selling the house, with the

With respect to the matter of a response by the Trustee, there seems to have been some confusion on the part of the Trustee arising from the manner in which the Debtors filed their objections to the contempt ruling. When the Debtors filed their objections to the contempt ruling, they accompanied it with a Motion for Stay of Contempt Proceedings and in support thereof referred to the objections to the contempt ruling filed therewith. See DE No. 255. On November 7, 1988, the Trustee filed a timely opposition to the Debtor's Motion for Stay of Contempt Proceeding. See DE No. 260. That opposition addresses the Debtors' contentions in their objections to the contempt ruling and ought to be treated as a response under Local

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cooperation of the Debtors, without the necessity of having to bring an ejectment action to oust the Debtors from the premises in order to make a sale.

Rule 602(e) to the Debtors' objections to the contempt ruling.

Apparantly because of the Debtors' failure to file a designation of record as required by Local Rule 602(d), the Clerk failed to transmit the record to the District Court as required by Local Rule 602(f). There is no sanction for failure to timely designate the record. Accordingly, it is

ORDERED that the Clerk of the Bankruptcy Court shall forthwith transmit to the Clerk of the District Court the following papers as the record for determination of the Debtors' objections to the Bankruptcy Court's contempt ruling:

1. Findings of Fact and Conclusions of Law Re Contempt. DE No. 242.

2. Order of Contempt. DE No. 241.

3. Motion of Shirley M. Kearing to Extend Time for Filing Objections to

Proposed Findings of Fact and Conclusions of Law, and Contempt Order. DE No. 246.

4. Order (enlarging time to file objections). DE No. 251.

5. Debtors [sic] Motion for Stay of Contempt Proceedings. DE No. 255.

6. Debtors' Objections and Request for De Novo Review and Hearing of the Bankruptcy Judge's Findings of Fact and Conclusions of Law. DE 256.

7. Debtors' Request for Oral Hearing. DE No. 258

8. Praecipe (requesting Bankruptcy Judge's attention to motion for stay). DE No. 257.

9. Trustee's Opposition to Debtors' Motion for Stay of Contempt Proceedings. DE No. 260.

10. Order Denying Motion for Stay. DE No. 280.

11. Order Re Transmission to District

Court of Objections to Contempt Ruling (i.e., this Order). It is further

ORDERED that, after the opening of a docket in the District Court in accordance with Local Rule 602(f), documents pertaining to the District Court's review of the objections to the Bankruptcy Court's contempt ruling shall be filed with the Clerk of the District Court.

Dated: January 18, 1989.

/s/ S. Martin Teel, Jr.
S. MARTIN TEEL, JR.
United States Bankruptcy Judge

FILED OCTOBER 24, 1988

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

RELIEF IS SOUGHT FROM
A UNITED STATES DISTRICT JUDGE

In re	:	
	:	Case No. 86-00913
LEON R. AND	:	
SHIRLEY M. KEARING,	:	(Chapter 11)
	:	
Debtors.	:	

DEBTORS' OBJECTIONS AND
REQUEST FOR DE NOVO REVIEW AND HEARING
OF THE BANKRUPTCY JUDGE'S
FINDINGS OF FACT AND CONCLUSIONS OF LAW

Debtors, Leon R. and Shirley M. Kearing, by and through Joseph Zitomer, attorney appointed to defend Shirley M. Kearing, pursuant to Bankruptcy Rule 9033 and Local Rule 603, object to the proposed Findings of Fact and Conclusions of Law re Contempt, of the Bankruptcy Judge, and to his proposed Order of Contempt entered on September 30, 1988, and states as follows:

1. Joseph Zitomer was appointed by the Bankruptcy Court Order of September 14,

1988, pursuant to the Criminal Justice Act, to appear and defend on behalf of Shirley M. Kearing with respect to the motion of the Trustee to hold her in contempt.

2. Although Leon R. Kearing, her husband, is not cited for contempt he agrees with the arguments of his wife in support of her objections and because issues of fact and of law are common to both he has authorized counsel for his wife to make him a party hereto.

3. These objections are timely filed, the time for filing having been extended to October 24, 1988 by Order of the Bankruptcy Judge on motion made within 10 days of the Findings of Fact and Conclusions of Law.

Objections to Findings of Fact

Objection: To the following Finding insofar as it states the subject has not been stayed pending appeal:

"That Order is the subject of a motion

for leave to appeal but it has not been stayed pending appeal." (Page 2 Id.)

Grounds for Objection: The District Court in Civil Action No. 88-1232, per Jackson, J., on August 11, 1988, ordered "that all further proceedings with respect to this appeal are stayed pending submission of the Bankruptcy Judge's written certification ...." Because the bankruptcy Judge has made no reply, that appeal is still pending certification. Instead, the bankruptcy Judge, on Trustee's motion, is threatening Shirley Kearing with contempt arising out of the same issues that are stayed pending appeal.

If she complies her appellate rights will be extinguished as moot by the fait accompli of the sale of her home. It appears therefore that only by risking contempt can Shirley Kearing preserve her right to review. Since Bankruptcy Rule

8005 provides that the bankruptcy judge should protect the rights of all parties pending appeal it should not be necessary that she risk contempt. But the Judge below apparantly overlooks taht protion of the Rule which states "[T]he bankruptcy judge may suspend or order the continuation of other proceedings in the case under the Code or make any other appropriate order during the pendency of an appeal on such terms as will protect the rights of all parties in interest." (underscoring supplied) (Id.).

This Bankruptcy Rule read in conjunction with Judge Jackson's Order that "[A]ll further proceedings with respect to this appeal are stayed pending ... certification" would seem to indicate that those issues pending review are to be preserved and no action taken which would prejudice the parties' right to that

review.

Unfortunately for Mrs. Kearing she had experienced that loss of the right to review in connection with the earlier sale of other real estate which she opposed. That deed was recorded hours before her appeal was to have been heard, making it moot.

The argument of appointed counsel before the Judge below, made at the commencement of the contempt hearing, that the proceedings should have been stayed in view of Judge Jackson's order was to no avail. Clearly it would have been an exercise in futility to formally move for a stay. However in order to protect the record a formal motion to the bankruptcy Judge for Stay has been filed contemporaneously.

The Elements Warranting a Stay

The four elements warranting and compelling the exercise of discretion to

stay the proceedings are here present and will be addressed below:

(1) She has meritorious appeal.

(2) She would suffer irreparable harm if the stay is not granted.

(3) The stay would not substantially harm the other parties.

(4) The stay would serve the public interest in providing a means by which the debtor could preserve her home and family intact and provide a greater return for creditors.

First: (1) The merits of her appeal.

Debtors discharged their original attorney when it appeared that legal fees and taxes incurred by the bankruptcy sale of several real estate parcels was eating up so much of their cushion that they would lose their home as well, and that instead of the re-organization under Chapter 11 originally contemplated, they would have

nothing left other than the statutory exemption and their creditors would be left with little or nothing. They were solvent when the original petition was filed and had a cushion of over $150,000. Their original attorney had already been awarded approximately $54,000 and taxes incurred by the bankruptcy sale were as yet unknown.

Debtors were acting thereafter pro se, but when the bankruptcy Judge threatened to appoint a trustee if they did not secure an attorney for the estate within a limited time, they secured the services of their nephew-in-law, Michael Huffstetler, an active practicing member of the D. C. Bar and an experienced lawyer and certified public accountant but with little or no experience in bankruptcy. He offered to act as attorney for the estate without fee and entered his appearance timely but the bankruptcy Judge refused to appoint him on

the grounds that Mr. Huffstetler was not qualified by experience, and as a nephew by marriage hew was disqualified as an "insider," citing U. S. Code 11-§327(a).

But § 327(a) is not applicable to the case at bar. In In re Covey, 57 B.R. 665 (Bkrtcy. D.S.D. 1986) it was pointed out that § 327(a) applied only to trustees not to debtors in possession as is the case here. Covey approved of a nephew-attorney acting as attorney for the debtors in possession saying:

> The trustee is required to be aloof from all connection with the debtor and its management. To require less of the trustee's attorney, who would be active in furthering the trustee's duties, would be illogical. The debtor-in-possession, however, is certainly not aloof from the debtor nor the management of the estate -- the debtor-in-possession is the debtor, managing the estate. Other facts take on more importance as a result, such as an attorney's familiarity with the affairs of the debtor and a debtor's confidence in overly rigid, mechanical application of the standards to the debtor-in-

possession would serve no one's best interests. (emphasis in original) (Id. at 666).

The same result was reached in In re Heatron, Inc., 5 B.R. 703 (Bkrtcy WD MO 1980); and In re O'Connor, 52 B.R. 892 (Bkrtcy. WD OK 1985).

The trustee, having been appointed, has now retained counsel. Instead of having a single attorney working pro bono with the full confidence and cooperation of the debtor in possession there is now an attorney charging as much or more than the original attorney, plus a trustee, all to be paid from the estate and ultimately from the creditors and debtors, thus thwarting the purpose of the Bankruptcy Act prompted by a mindlessly rigid and mechanical misapplication of the Rules.

Second: (2) Shirley Kearing would suffer irreparable harm if the stay were not granted.

Just as the earlier sale of another parcel of real estate was mooted by the recording of the deed the day before the scheduled hearing of the District Judge, Shirley Kearing knows that her cooperation with the Trustee will place him in the same position to do irreparable harm. He will be able to secure a contract and the bankruptcy Judge's approval of a sale and record the deed before the pending appeal could be heard making her appeal moot.

Third: (3) The stay would not substantially harm the other parties.

There are no fungible goods to lose, machinery to wear out, nor assets subject to rapid depreciation. Quite the reverse is true. The only major asset left is their home at 4801 Van Ness Street, N. W., Washington, D. C., a neighborhood where the price of homes has appreciated substantially since the petition was filed,

so much so that if more than off-sets any interest accrued on the outstanding mortgages. Hence no one would be harmed by a stay. On the contrary a stay could affect substantial savings.

Fourth: (4) The stay would serve the public interest in providing a means by which the debtor could preserve her home and family intact and provide a greater return for creditors.

The debtors are confident that they could present a plan to preserve their home and pay off creditors if they were allowed to employ their nephew as attorney for the estate without the burden of trustee's and attorney's fees. They feel that he has such skill, knowledge, and devotion, that with the aid of other relatives they will be able to complete re-organization to the benefit of creditors as well as themselves if given that opportunity and they have

every trust and confidence in him.

WHEREFORE, debtors pray that this court grant a hearing de novo and permit debtors to introduce further evidence and argument in support.

October 24, 1988

/s/ Shirley M. Kearing
Shirley M. Kearing

/s/ Leon R. Kearing
Leon R. Kearing

/s/ Joseph Zitomer
Joseph Zitomer, Bar # 138925
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Silver Spring, Md., 20910.
(301) 589-1002

FILED OCTOBER 24, 1988

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

RELIEF IS SOUGHT FROM
A UNITED STATES DISTRICT JUDGE

In re	:	
	:	Case No. 86-00913
LEON R. AND	:	(Chapter 11)
SHIRLEY M. KEARING,	:	
	:	
Debtors.	:	

DEBTORS' REQUEST FOR ORAL HEARING

Debtors, Leon R. and Shirley M. Kearing, request an oral hearing of their Objections and Request for De Novo Review.

October 24, 1988

Respectfully submitted,
/s/ Joseph Zitomer
Joseph Zitomer

POINTS AND AUTHORITIES

Local Rule 108(f) Request for Oral Hearings

/s/ Joseph Zitomer
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Attorney for Shirley M. Kearing

FILED AUGUST 12, 1988

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In Re	)	
	)	
LEON R. AND	)	Civil Action
SHIRLEY M. KEARING,	)	No. 88-1232
Debtors	)	

ORDER

It appearing to the Court that the debtors have responded to this Court's order of July 20, 1988, by filing a motion for leave to appeal, and that this Court wishes to request of the Bankruptcy Judge, pursuant to D.D.C. Rule 604(c), a written certification stating whether, in the Bankruptcy Judge's opinion, and after considering the motion for leave to appeal and the answers thereto, the interlocutory orders appealed involve a "controlling question of law as to which there is a substantial ground for difference of opinion and whther an immediate appeal from the order[s] [sic] may materially advance

the ultimate termination of the case"; it is, this 11th day of August, 1988,

ORDERED, that any parties adverse to the debtors may file an answer with the Clerk of the Bankruptcy Court in opposition to the motion for leave to appeal within ten (10) days of the date herein; and it is

FURTHER ORDERED, that all further proceedings with respect to this appeal are stayed pending submission of the Bankruptcy Judge's written certification and accompanying materials to this Court, see Bankr. Rule 8003(b), as well as the ultimate decision of this Court to grant or deny the debtors' motion for leave to appeal.

/s/ Thomas Penfield Jackson
Thomas Penfield Jackson
U.S. District Judge

FILED APRIL 18, 1988

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In re	)	
	)	
LEON R. AND	)	Civil Action No.
SHIRLEY M KEARING	)	88-589 (SSH)
Debtors.	)	

On Appeal from the
United States Bankruptcy Court
for the District of Columbia

Bankruptcy Case No. 86-913
(Chapter 11)

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF MOTION TO DISMISS APPEAL

In support of his Motion to Dismiss, John W. Guinee, Jr., by counsel, respectfully states as follows:

1. On January 14, 1988, Leon R. and Shirley M. Kearing, debtors, by and through their attorney, Michael R. Huffstedler [sic], filed an appeal to the District Court from the orders of the Bankruptcy Court entered in the aforementioned bankruptcy proceeding on the 4th day of January, 1988.

2. On March 3, 1988 the appeal referred to above was entered on the docket and was assigned to Judge Harris and received the civil action number 88-589.

3. On March 3, 1988, notice of the appeal from the United States Bankruptcy Court was mailed to all parties. The notice directed the debtors to serve and file their brief within fifteen days after the entry of the appeal, or by March 18, 1988.

4. As of the date of this Motion, the Trustee has not been served with a copy of Appellants' brief.[4] Therefore, this appeal

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[4] In their Emergency Motion For Reconsideration For a Stay of All Judgments, Orders, Decrees and for Other Relief Pending Appeal, filed in this appeal, the debtors have indicated that on March 25, 1988 they filed for an extension of time to file their brief on their appeal, on the basis that it was not filed due to "excusable neglect". [sic] The Trustee has not been served with a copy of this Motion and has not had an opportunity to respond to said Motion. This ex parte Application For Extension of Time should

should be dismissed. See, e.g., Matter of Braniff Airways, Inc., 774 F.2d 1303 (5th Cir. 1985); In re Webster, 47 B.R. 1012 (D.C.N.C. 1985); In re Soter, 31 B.R. 986 (D.C. Vt. 1983).

5. Similarly, a motion for leave to appeal must accompany any appeal of the January 4, 1988 orders of the bankruptcy court since they are interlocutory in nature. 28 U.S.C. § 158 (a), Bankruptcy Rules 8001(b), 8003. See, e.g., Petition of Trustees of Joint Welfare Fund, et al., 549 F.2d 871 (2nd Cir. 1977); Pan-Tsu Mow v. Republic of China, 201 F.2d 195 (D.C. Cir. 1952). The Debtors failed to file the required motion for leave to appeal. Therefore, the appeal should be dismissed.

6. The pendency of this appeal is one factor that is unnecessarily hindering the Trustee's ability to proceed with the

---

therefore be considered null and void.

orderly administration of the bankruptcy estate, and may cause injury to the creditors and to the estate in the form of needless delay with a concomitant monetary loss.[5]

Based on the foregoing, the Trustee, by counsel, respectfully requests that this Motion to Dismiss be granted and that he be granted such other relief as this Court deems proper.

---

[5] In the April 7, 1988 hearing in the Chapter 11 proceeding, the debtors admitted that they have been collecting rent on three of the four real properties now owed [sic] by the debtors. All but $1,000 of this money has been converted by the debtors to their own personal use because the Trustee's efforts to obtain control of the debtors' property has been thwarted by the debtors. Consequently, a prompt resolution of the appointment of the Trustee is necessary in order to ensure that the Trustee can move forward with his responsibilities, thereby preventing the assets of the estate from being further depleted.

Respectfully submitted,

/s/ Peter R. Kolker

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FILED APRIL 18, 1988

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In re	)	
	)	
LEON R. AND	)	Civil Action No.
SHIRLEY M KEARING	)	88-589 (SSH)
Debtors.	)	

On Appeal from the
United States Bankruptcy Court
for the District of Columbia

Bankruptcy Case No. 86-913
(Chapter 11)

MOTION TO DISMISS APPEAL

John W. Guinee, Jr., Trustee to Leon R. and Shirley M. Kearing, debtors in the above-mentioned Chapter 11 proceeding, hereby moves this Court for an order dismissing this Appeal. A memorandum in support of this Motion and a proposed order are attached hereto.

Respectfully submitted,

/s/ Peter R. Kolker
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FILED MARCH 15, 1988

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In re	)
	) Case No. 86-00913
LEON R. AND	) Chapter 11
SHIRLEY M KEARING	)
	) ----------
Debtors.	) District Court
	) Case No. 88-1232
	) TPJ

TRUSTEE'S BRIEF IN OPPOSITION
TO OBJECTIONS OF DEBTORS TO
FINDINGS OF FACT AND
CONCLUSIONS OF LAW RE: CONTEMPT

JOHN W. GUINEE, JR., TRUSTEE
By Counsel

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Judith Sturtz Karp
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March 15, 1989

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STATUTES AND RULES

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INTRODUCTION

This matter comes before this Court for de novo review, pursuant to Bankruptcy Rules 9020 and 9033, on the objection of the Debtors herein, Leon R. Kearing[6] and Shirley M. Kearing, to the Findings of Fact and Conclusions of Law Re Contempt and Order of Contempt entered by the United States Bankruptcy Court for the District of Columbia against Shirley M. Kearing on September 30, 1988.

ISSUES FOR REVIEW

Whether the Citation of Contempt of Shirley M. Kearing was appropriate under the circumstances.

Whether the April 25, 1988, Bankruptcy

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[6] The Bankruptcy Court entered an Order Denying Contempt Motion with Respect to Leon R. Kearing on September 30, 1988. However, Dr. Kearing authorized counsel for Mrs. Kearing, Joseph Zitomer, to join him as a party to the objections to the Bankruptcy Court's Findings of Fact and Conclusions of Law Re Contempt.

Court Order granting the Trustee's Motion to Compel Cooperation by Debtors was stayed pending appeal.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

On December 15, 1987, John W. Guinee, Jr., was appointed Trustee of the Chapter 11 estate of Leon R. and Shirley M. Kearing (the "Debtors"), Case No. 86-00913. The Debtors strenuously objected to the appointment of the Trustee, refused to cooperate with the Trustee in any manner, or to perform their statutory duties under 11 U.S.C. § 521. On the 8th of February, 1988, failing to obtain the Debtors' minimal cooperation, the Trustee filed a Motion to Compel Cooperation by Debtors. Among other things, the Trustee specifically requested the Debtors be ordered to turn over records of their bank account at American Security Bank and cooperate with the Trustee in obtaining

offers for the purchase of their residence by permitting access to the premises to determine its marketability and to allow prospective purchasers an opportunity to inspect the home.

No opposition to the Trustee's motion was ever filed. On April 7, 1988, at a hearing on other matters, the Bankruptcy Court requested the Trustee address the Court regarding the merits of the the [sic] Motion to Compel Cooperation of Debtors. Mrs. Kearing was given the same opportunity. Mrs. Kearing argued against granting the motion.

On April 25, 1988, the Bankruptcy Court entered an Order granting the Trustee's Motion to Compel Cooperation of Debtors. The Court, in pertinent part,

> ORDERED that Leon R. and Shirley M. Kearing make available for inspection the real property owned by said Debtors, including 4801 Van Ness Street, N.W.,

Washington, D. C., by the Trustee and/or an agent to be designated by the Trustee, at 12 noon to 5:00 p.m. Monday through Friday and from 1:00 p.m. to 5:00 p.m. on Sunday, as reasonably necessary to determine the marketability of the home ... [sic]

ORDERED that the Debtor Shirley Kearing immediately turn over to the Trustee the funds of Debtors at the American Security Bank, N.A. (the Court finding that these funds represent rents received after the Trustee was appointed) and that the Debtor, Shirley Kearing, immediately turn over to the Trustee any and all rents that she may in the future collect from the tenants of Units 201, 502 and 504, 4444 Connecticut Avenue, N.W., Washington, D. C., and that the Debtor, Shirley Kearing, direct said tenants to make all future rent payments directly to the Trustee ... [sic]

ORDERED that the Debtor, Shirley Kearing, mail to the Trustee by April 17, 1988 copies of all bank statements, cancelled checks, deposit

> slips and withdrawal slips for the Debtors' account at American Security Bank, N.A.....

Lastly, the Debtors were ordered to cooperate with the Trustee generally in order that he fulfill his statutory duties.

On April 25, 1988, the Debtors filed a Notice of Appeal of the Order appointing the Trustee as well as any orders which the Court issued pursuant to the hearing on April 7, 1988, which included the April 25 Order Compelling Cooperation.[7] Simultaneously, the Debtors filed with the Bankruptcy Court an Emergency Application for A Temporary Restraining Order and Motion for Stay Pending Appeal, whereby they requested a stay of all matters pending final determination of the appeals,

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[7] As the Bankruptcy Court had not actually issued the Order Compelling the Debtors to Appeal, the Notice of Appeal referred to rulings which the Bankruptcy Judge had made at the hearing on April 7, 1988.

as well as an order restraining the Trustee from conducting any of his statutory duties. Both the Application for a Temporary Restraining Order and the Motion for Stay Pending Appeal were denied on April 27, 1988.

Thereafter, the Trustee attempted to gain entry into Debtors' residence by setting appointments with Mrs. Kearing, but all attempts failed. similarly, Mrs. Kearing refused to turn over the bank records of the account at American Security Bank and the rents deposited to that account. When the Trustee attempted to obtain these items, he was told by Mrs. Kearing that she "had no intention of ever complying with the Court Order." Declaration of John W. Guinee, Jr., Trustee, in Support of Motion for Issuance of Show Cause Order, page 2, paragraph 5.

Unable to perform his statutory duties

because of the Debtors' lack of cooperation, on May 19, 1988, the Trustee filed a Motion for Issuance of Show Cause Order, requesting the Court hold the Debtors in contempt for failure to comply with the Court's April 25, 1988 Order.

While the Motion for the Order to Show Cause were under consideration, the appeals of the Order Appointing John W. Guinee, Jr., as Trustee, Order permitting the Trustee to give Standard Federal Savings Bank deeds in lieu of foreclosure, as well as the April 25, 1988 Order Compelling Cooperation of Debtors were pending.

On August 12, 1988, after finding that the Orders on which the Debtors sought appeal were interlocutory, and that the Debtors' Notice of Appeal should be treated as a Motion for Leave to Appeal, the District Court issued an Order which requested a certification from the

Bankruptcy Court Judge, indicating whether each Order noticed for apepal involved a "controlling question of law as to which there was a substantial ground for difference of opinion and whether an immediate appeal from the order(s) may materially advance the ultimate termination of the case." It was further ordered "that all further proceedings with respect to this appeal are stayed pending submission of the Bankruptcy Judge's written certification and accompanying materials to this Court ..., as well as the ultimate decision of this Court to grant or deny the debtors' motion for leave to appeal."

Thereafter, on August 16, 1988, the Bankruptcy Court ordered Mrs. Kearing to appear in court and show cause why she should not be punished for civil contempt of court for failing to obey the Court's April 25, 1988, Order and cooperate with

the Trustee.

Following the appointment of counsel to represent Mrs. Kearing on September 14, 1988, on September 20, 1988 the Court held a hearing on its Order for Mrs. Kearing to show cause why she should not be held in civil contempt.

At the September 20, 1988, hearing, Mrs. Kearing testified tht she willfully ignored the Court's April 25, 1988 Order. Counsel argued that Mrs. Kearing believed that Order to have been stayed by the District Court's Order of August 12, 1988.

On September 30, 1988, the Bankruptcy Court entered an Order of Contempt against Mrs. Kearing, together with Findings of Fact and Conclusions of Law re Contempt. Thereafter, on October 24, 21988, the Debtors filed timely objections to the Findings of Fact and Conclusions of Law and filed a Motion for Stay of Contempt

Proceedings pending the determination of Civil Action 88-1232.[8]

On January 17, 1989, the Bankruptcy Court denied the Debtors' request for stay, holding that since timely objections were filed by the Debtors to the Order of Contempt, the Order of Contempt would not become effective unless it was adopted by the District Court in ruling on the objections. Since there was no contempt order in effect, there was no order to stay.

On February 10, 1989, the Debtors filed an Emergency Motion for a Stay of All Judgments, Orders, Decrees and Other Relief Pending Appeal. On February 13, 1989, the District Court denied the Emergency Motion.

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[8] The Bankruptcy Judge had not yet issued his written certification as requested by the District Court; therefore, there had not been a decision by the District Court to either grant or deny the Debtors' Motion for Leave to Appeal.

ARGUMENT

Bankruptcy Rule 9020 governs contempt proceedings in the Bankruptcy Court. Bankruptcy Rule 9020(c) sets forth the manner in which an order for contempt shall become effective:

> The clerk shall serve forthwith a copy of the order of contempt on the entity named herein. The order shall become effective 10 days after service of the order and shall have the same force and effect as an order of contempt entered by the district court unless, within the 10 day period, the entity named therein serves and files with the clerk objections prepared in a manner provided by Rule 9033(b). If timely objections are filed, the order shall be reviewed as provided in Rule 9033.

Bankruptcy Rule 9020(c).

Rule 9033 provides that a party serve and file with the clerk "written objections which identify the specific proposed findings or conclusions objected to and

state the grounds for such objections ...." Bankruptcy Rule 9033(b) (emphasis added).

Bankruptcy Rule 9033(d) provides the standard of review by the district court of any objections to the Bankruptcy Judge's findings of fact or conclusions of law:

> The district judge shall make a de novo review upon the record or, after additional evidence, of any portion of the bankruptcy judge's findings of fact or conclusions of law to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the proposed findings of fact or conclusions of law, receive further evidence, or recommit the matter to the bankruptcy judge with instructions.

Bankruptcy Rule 9033(d).

Inasmuch as the Debtors only specifically objected to the finding that the April 25, 1988, Order was "subject to a motion for leave to appeal but it had not been stayed pending appeal" (Debtors' Objections and

Request for De Novo Review and Hearing of the Bankruptcy Judge's Findings of Fact and Conclusions of Law, p. 2), that is the only finding to be reviewed by this Court.

As grounds for their objection, the Debtors assert that the August 12, 1988 District Court Order which stayed all briefing and procedural motions pending the outcome of the Motion for Leave to Appeal, also stayed the effect of the Order Compelling Cooperation of Debtors, as well as all other Orders from which the Debtors were seeking leave to appeal.[9]

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[9] While it is not properly before the Court, the Debtors also now assert that Mrs. Kearing's contempt is excused because she "reasonably" feared taht cooperating with the Trustee would enable the Trustee to sell her home to a third party and thereby make her appeal moot while she awaited the Bankruptcy Judge's certification. Mrs. Kearing would have this Court condone disobeyance [sic] of the Order because she did not want her home to be sold. Though understandable, it does not excuse her behavior. Fear of an undesired consequence of a court order does not make that behavior less contumacious.

There has been no error by the Bankruptcy Court in finding that the August 12, 1988 Order did not stay the enforecement of the Order compelling the Debtors to cooperate with the Trustee. The Bankruptcy Colurt had previously denied the Debtors' motion to stay that Order on April 27, 1988. Similarly, the District Court had denied the Debtors' July 1, 1988 Emergency Motion for a Stay of All Judgments, Orders, Decrees and for Other Relief Pending Appeal on July 8, 1988. Clearly, the District Court's Order staying all further "proceedings with respect to the appeal pending" was not intended to stay the entire bankruptcy case pending

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The Trustee never requested that the home be actually be sold. That could only happen after specific application to the Court, notice and hearing. 11 U.S.C. §363. Thus her fear was unfounded. Mrs. Kearing is of the firm belief that she could reorganize her financial affairs, but for the appointment of the Trustee. Therefore, she refuses to recognize his authority.

appeal, but rather, the order staying all further proceedings was entered by the Court in order to prevent unnecessary briefing on the appeals while awaiting the Bankruptcy Judge's written certification.

Mrs. Kearing has had plenty of time since September 30, 1988 to think about her actions and remedy them. She has chosen to continue to purposely and callously ignore the Bankruptcy Court's Orders even after the District Court denied her Motion for Leave to Appeal at a status call on January 27, 1989. The Debtors' subsequent Emergency Motion for Stay of All Judgments, Orders, Decrees and Other Relief Pending Appeal filed on February 10, 1989 in the District Court was similarly denied on February 13, 1989; yet, Mrs. Kearing persists in her contempt for the Bankruptcy

Court's Order.[10]

There can be no disputing that the Bankruptcy Court's April 25, 1988 Order was never stayed by any order of either the Bankruptcy Court or District Court.

Since no other objection to the contempt citation has been raised, it is an inevitable consequence of this ruling that the contempt citation should be affirmed by this Court.

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[10] On January 19, 1989, a fire seriously damaged the Debtors' residence, forcing the Debtors and their tenants to live elsewhere. At this time, the Debtors are not in possession of the property and thus are not presently violating that part of the Order Compelling Cooperation which requires them to make the premises available to the Trustee to determine the property's marketability. The requirement to turn over rents to the Trustee is moot as no portion of the property is now rented. Without the Trustee's specific authority, however, the Debtors are forbidden from re-entering the house, pursuant to a Bankruptcy Court Order entered on February 6, 1989.

CONCLUSION

The April 25, 1988 Bankruptcy Court Order granting the Trustee's Motion to Compel Cooperation of Debtors was not stayed pending appeal by the District Court's August 12, 1988 Order in Civil Action No. 88-1232, or by any other Bankruptcy or District Court order. Therefore, the Bankruptcy Court did not err in its finding. The Debtors' objections must be overruled, and the Court should enter an order of contempt against Mrs. Kearing so that the Trustee can acquire and maintain complete control of the Debtors' estate. The Trustee recommends that the District Court remand this matter to the Bankruptcy Judge to determine the appropriate sanction to be imposed, since the intervening event of the fire has obviated some of Mrs. Kearing's non-compliance.

Respectfully submitted,

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(S)

90-1217

FILED
JAN 28 1991
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1990

Shirley M. Kearing,
Petitioner,

v.

The Honorable S. Martin Teel, Jr., et al,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
For the District of Columbia

APPENDIX D
BANKRUPTCY COURT

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FILED OCTOBER 10, 1989

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

In Re	)	
	)	
LEON R. AND	)	Case No. 86-00913
SHIRLEY M. KEARING,	)	(Chapter 11)
Debtors	)	

REQUEST BY BANKRUPTCY JUDGE
FOR WITHDRAWAL OF REFERENCE IN PART
PURSUANT TO DISTRICT COURT
LOCAL RULE 602(a)

The Bankruptcy Judge hereby requests, pursuant to District Court Local Rule 602(a), that the District Court, using its discretionary power provided by 28 U.S.C. § 157(a), withdraw the reference of this case, in part, for the sole purpose of hearing the Trustee's "Emergency Motion for Issuance of Order to Show Cause" (copy attached), seeking to hold the Debtors in contempt for failing to comply with this Court's order of April 25, 1988, requiring the Debtors to cooperate with the Trustee in the sale of the estate's property at

4801 Van Ness, N.W.[1] The request is filed for the following reasons:

The procedures required by Bankruptcy Rule 9020 in conjunction with District Court Local Rule 602 and Bankruptcy Rule 9033 are cumbersome for purposes of imposition of coercive contempt sanctions.[2] For example, if a proposed contempt order is entered and objections thereto are

---

[1]As discussed in greater detail under "Additional Information" the Trustee Additionally seeks to incarcerate Ms. Kearing for continuing contempt already adjudicated by an Order of September 30, 1988 subsequently adopted by the District Court.

[2]In this Court's view Rule 9020 works well with respect to compensatory contempt sanctions but, because of the delays in any order becoming final, it does not work efficiently when any modicum of urgency exists in compelling compliance with the Court's orders by way of coercive contempt sanctions. If the Trustee's motions are granted, any sanctions would undoubtedly be coercive because the Court has previously found that Ms. Kearing has no property or income of her own from which compensatory sanctions could be paid. The threat of compensatory sanctions is simply unlikely to encourage compliance.

filed, lengthy delays would be encountered as a result of the time necessary for designation of record, for preparation and transmission of a transcript and for submission of briefs in accordance with Local Rule 603.

In addition, the Trustee is attempting to market the property now. If the Trustee's allegations are well-founded that the Debtors have been interfering with his marketing efforts in violation of this Court's Order of April 25, 1988, and an order for coercive contempt sanctions is entered by this Court, a substantial delay of many weeks would be inevitable before the order would become effective. Such delay would be unreasonable and would deprive the Trustee and the creditors of the estate of the advantages of marketing of the property in the prime selling season of the fall.

It is estimated the hearing on the Trustee's motion would take one hour. The Bankruptcy Judge remains prepared to handle the matter pursuant to Bankruptcy Rule 9020 if the District Court is unable to hear the matter promptly or if it determines that the interests of justice otherwise do not warrant withdrawal of the reference (for example because review under Rule 9020 would be expedited).

Additional Information

By way of background, attached are copies of this Court's Orders of April 25, 1988, directing the Debtor's cooperation, of September 30, 1988 (holding Shirley M. Kearing in contempt for failing, inter alia, to permit access to the premises to allow them to be shown to prospective purchasers), and of February 6, 1989, directing that the Trustee take possession of the premises after they [sic] had

suffered a fire. A copy of the District Court's Order of August 2, 1989 affirming the contempt order is attached.

The prior contempt hearing involved Ms. Kearing's earlier failure to cooperate in the sale of the property at a time when she still occupied the house. The Bankruptcy Court held her in contempt (for failing to allow prospective purchasers to visit the property) and the contempt order was affirmed upon review by the Honorable Thomas Penfield Jackson. Because the house had been damaged so extensively by the fire, sales efforts were temporarily halted. The question of whether Mrs. [sic] Kearing would cooperate in the sale was thus temporarily moot, and Ms. [sic] Kearing was never actually incarcerated.

The Trustee is of the view that the September 30, 1988, contempt order is itself a basis for Ms. Kearing being

incarcerated. Although the fire damage caused her temporarily to be incapable of contempt because the property could not be sold while damaged, once the premises were restored to saleable condition in September, 1989, she again allegedly resumed her contumacious conduct. Because it is the District Court's [margin note of Judge Teel: on appeal in US Court of Appeals 9/2/89] contempt order and because the Bankruptcy Judge does not enjoy the Article III status under the Constitution, the District Judge arguably is the appropriate judge to hear the question of whether the Debtor has failed to remain purged of contempt. Such doubts about whether "purge hearings" ought to be heard by the Bankruptcy Judge form an additional basis for withdrawal of the reference.

Status in Bankruptcy Court

This Court held a hearing on the

Trustee's Emergency Motion on October 6, 1989. The Debtors failed to appear. The Debtors had been notified by hand-delivery of the hearing. The Bankruptcy Court will not issue a ruling under Bankruptcy Rule 9020 pending resolution of the question of withdrawal of the reference.

Because Mrs. Kearing has had appointed counsel based on inability to afford counsel in regard to the earlier contempt proceeding, the Court arranged for an attorney from the District Court's list of attorneys who may serve as appointed counsel to be present at the hearing in the event that Ms. Kearing again requested counsel. That attorney, Samuel Edgar Wilhite, attended the hearing of October 6, 1989, and has reviewed the papers but was not appointed because Ms. Kearing failed to appear. Joseph Zitomer, the attorney who handled an earlier contempt proceeding

against Ms. Kearing, was unavailable.

Dated: October 10, 1989

/s/ S. Martin Teel, Jr.
S. MARTIN TEEL, JR.
United States Bankruptcy Judge

FILED FEBRUARY 6, 1989

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

In Re	)	
	)	
LEON R. AND	)	Case No. 86-00913
SHIRLEY M. KEARING,	)	(Chapter 11)
Debtors	)	

ORDER DENYING RECUSAL

It is hereby

ORDERED that the Motion Request for Judge Teel To Recuse Himself From This Chapter 11 Reorganization Case is DENIED.

Dated: February 6, 1989.

/s/ S. Martin Teel, Jr.
S. MARTIN TEEL, JR.
United States Bankruptcy Judge

FILED JANUARY 6, 1988

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

In Re	)	
	)	
LEON R. AND	)	Case No. 86-00913
SHIRLEY M. KEARING,	)	(Chapter 11)
Debtors	)	

CERTIFICATION RE APPEAL PENDING
AS CIVIL ACTION NO. 88-1232
IN DISTRICT COURT

Pursuant to the District Court's Order, filed August 12, 1988, as Docket Entry ("DE") No. 14 in Civil Action No. 88-1232, and after considering the motion for leave to appeal (DE #13 in Civil Action No. 1232), the opposition thereto filed by the Trustee (DE #222 in this case), and the statement of Standard Federal Savings Bank (DE #223 in this case), the Bankruptcy Court certifies its opinion regarding whether the interlocutory orders appealed involved a "controlling question of law as to which there is a substantial ground for difference of opinion and whether an

immediate appeal from the order[s] [sic] may materially advance the ultimate termination of the case" as follows:

A. ORDER GRANTING TRUSTEE'S APPLICATION TO EMPLOY COUNSEL

1. Absence of Controlling Question of Law as to Which there is Substantial Ground for Difference of Opinion

The interlocutory order entered April 11, 1988, granting the Trustee's application for authority to employ counsel under a general retainer as necessary employment "in the best interests of the estate and its creditors," is squarely based upon the express authority of 11 U.S.C. § 327(a). That Code provision states in relevant part:

> (a) [T]he trustee, with the court's approval, may employ one or more attorneys ... that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under [title 11.] [sic]

In light of the explicit authority for the Order entered April 11, 1988, it is the opinion of this Court that the Order does ot involve a controlling question of law as to which there is a substantial ground for difference of opinion. Thus, on that basis, the motion for leave to appeal should not be granted.[3]

2. Absence of Material Advancement of

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[3] This Court reached its decision upon a determination that the employment of the attorney for the trustee "is necessary and ... in the best interests of the estate and its creditors ...." Thus, the Order contains a reasonable basis upon which the Court made its determination to grant the trustee's application. Interlocutory appeals of discretionary or factual decisions of this nature, where the Bankruptcy Court has applied the correct legal standard, are ordinarily not to be granted. In re Committee of Asbestos-Related Litigants, 749 F.2d 3, 5 (2nd Cir. 1984) ("interlocutory appeals of essentially factual questions are especially disfavored")' In re Tidewater Group, Inc., 22 B.R. 500, 506 (N.D. Ga. 1982); In re Executive Office Centers, Inc., 75 B.R. 60, 61 (E.D. La. 1987); In re San Juan Hotel Corp., 50 B.R. 326 (D. P.R. 1986); 3 Collier on Bankruptcy, Par.3.03 at p. 186 (15th Ed.).

Ultimate Termination of Case by an Immediate Appeal

An appeal of the April 11 Order - immediate or otherwise - would have no effect on advancing the ultimate termination of this case. The Order expressly provides that compensation for the trustee's attorney will be paid only as allowed by the Court "upon proper application ...." Thus, the debtors' objection to the April 11, 1988, Order, on the basis that the estate cannot afford the employment could be appropriately and effectively raised by their filing in Bankruptcy Court their objections to any future applications for payment filed by the trustee's attorney, rather than through their present appeal. Accordingly, it is the opinion of this Court that no appeal should be granted on this basis.

Conclusion Re April 11, 1988, Order

It is the opinion of this Court that

motion for leave to appeal the April 11, 1988, Order granting the Trustee's application for employment of an attorney should be denied inasmuch as the Order does not involve a controlling question of law as to which there is a substantial ground for difference of opinion and an immediate appeal would not materially advance the ultimate termination of the case.

B. ORDER GRANTING THE TRUSTEE'S MOTION TO COMPEL THE COOPERATION OF THE DEBTORS

The Order Granting the Trustee's Motion to Compel the Cooperation of Debtors was entered on April 25, 1988, after adequate opportunity for the Debtors to be heard.[4]

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[4] The motion was served on January 4, 1988, and filed on February 8, 1988. No opposition was ever filed as required by Local Rules of this Court. At a hearing of April 7, 1988, on other matters, the Court permitted the Trustee to address the motion to compel cooperation. Shirley Kearing argued against granting of the motion. Although Leon R. Kearing was in the courtroom, he chose not to announce his attendance and he was not heard on the matter. However, he failed to file any

On September 30, 1988, this Bankruptcy Court entered an Order of Contempt pursuant to Bankruptcy Rule 9020, holding Shirley M. Kearing in contempt for failure to comply with the Order of April 25, 1988. The contempt order is subject to review pursuant to Bankruptcy Rule 9033(b) and District Court Rule 6033 [sic]. Objections were timely filed to the contempt order of September 30, 1988.

1. Damages Award

The Order of April 25, 1988 required a turnover of certain rentals. The Debtor defied that order and exhausted the funds. That turnover order is now moot insofar as prospective effect is concerned. However, the turnover order still is not moot in its entirety because it resulted in an award of compensatory damages for contempt. The

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written opposition to the motion either before or after the hearing.

turnover order, while originally interlocutory, ought to be viewed now as an appealable, final order incident to the appeal by Mrs. Kearing of civil contempt. The Order is severable from any other ongoing litigation in the bankruptcy case.

2. Discovery Orders

In contrast, the provisions of the order of April 25, 1988, that still retain prospective effect[5] were in the nature of discovery orders to facilitate the Trustee's ongoing efforts to sell the Debtors' home.

Those provisions of the order require the property to be made available for inspection by the Trustee and members of the public in order to assure a sale at the best price. The sale of property of the

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[5] Ordinarily a litigant may not obtain review of a discovery order except by way of appeal of an order of criminal contempt.

Debtors and discovery ordres incident thereto constitute "core" matters, reviewable by the District Court only upon appeal, and not by way of de novo review. 28 U.S.C. §§ 157, 158; Bankruptcy Rules 8001, 9033. Any order of sale -- the ultimate final order sought pursuant to the Trustee's sales efforts -- will be subject to review by the District Court by way of appeal. Discovery orders in ongoing litigation are generally not subject to interlocutory appeals. Atlantic Richfield Co. v. U.S. Dept. of Energy, 769 F.2d 771, 780-781 n. 62 ((D.C. Cir. 1984); Matter of Int'l. Horizons, Inc., 689 F.2d 996, 1001 (11th Cir. 1982). The courts go even further and hold that a party-litigant to whom a discovery order has been issued (as opposed to a non-party witness) may not appeal a civil contempt order for refusing to comply with the discovery order. Doyle

v. London Guarantee & Accident Co., 204 U.S. 599, 603 (1907); Int'l Ass'n of Machinists v. Eastern Airlines, Inc., 849 F.2d 1481, 1484 (D.C. Cir. 1988). While the District Court is, of course, granted authority under Bankruptcy Rules 9020 and 9033 to review de novo any order of contempt to which a timely objection is made, the District Court is not required to review the underlying interlocutory order which the Debtor has been found to have violated. The policies against interlocutory review of discovery orders, including the prevention of delay proceedings, see American Express Warehousing, Ltd. v. Transamerica Ins. Co., 380 F.2d 277, 280 (2d Cir. 1967), are particularly pertinent in the context of an ongoing bankruptcy estate liquidation where allowance of the appeal may frustrate the goal of prompt liquidation of the estate

for the benefit of creditors and other interested parties. The District Court has discretion to grant an interlocutory appeal, but the Bankruptcy Court recommends against it. The questions raised by the discovery provisions of the April 25, 1988, order are not such as to warrant an immediate appeal. None of them is a "controlling question of law as to which there is a substantial ground for difference of opinion" and an immediate appeal would not "materially advance the ultimate termination of the case."[6]

C. ORDER APPROVING THE SETTLEMENT OF MOTIONS SEEKING RELIEF FROM STAY, COMPROMISING MUTUAL CLAIMS, AND AUTHORIZING TRUSTEE TO EXECUTE DEEDS IN LIEU OF FORECLOSURE AS TO

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[6] The concluding provision of the Order of April 25, 1988, requiring the Debtors generally to cooperate, if read as being limited to the specific items of cooperation required, is plainly not erroneous. To the extent it might be read otherwise, the District Court may wish to grant an appeal for purposes of clarifying the scope of this language.

UNITS 201, 502, AND 504, 444 [sic]
CONNECTICUT AVENUE, N.W.,
WASHINGTON, D. C.

The deeds in lieu of foreclosure as to Units 201, 502, and 504, 444 [sic] Connecticut Avenue, N.W., Washington, D. C., have already been transferred, as the District Court so ruled in its Memorandum and Order of July 20, 1988 (DE #12 in Civil Action No. 88-1232. See 11 U.S.C. § 363(m); Sun Valley Ranchers, Inc. v. Equitable Life Assur. Soc., 823 F.2d 1373, 1374-5 (9th Cir. 1987). The appeal of the order approving the settlement of motions seeking relief from stay, compromising mutual claims, and authorizing the Trustee to execute those deeds in lieu of foreclosure is moot.

Whatever character the proposed appeal may have had befored, the questions presented on appeal are now academic and can no longer be deemed to present a

controlling question of law as to which there is a substantial ground for difference of opinion. Nor would an appeal to consider those moot questions materially advance the ultimate termination of the case. Thus, whether the appeal is viewed as an appeal from a final or an interlocutory order, it ought to be denied as moot.

Dated: January 6, 1989.

/s/ S. Martin Teel, Jr.
S. MARTIN TEEL, JR.
United States Bankruptcy Judge

FILED SEPTEMBER 16, 1988

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

In Re:	)	
Leon R. and	)	
Shirley M. Kearing	)	Case No. 86-00913
Debtors, Pro Se	)	(Chapter 11)

STATEMENT OF INTENT

On April 21, 1988, the Debtors filed a "notice of appeal" to the District Court for the District of Columbia concerning "other orders forthcoming at hearing on April 7, 1988," which now includes the bankruptcy court's order "to compel cooperation by debtors," that was finally entered on April 25, 1988.

On August 12, 1988, the District Court for the District of Columbia filed an "order" that, among other things, explicitly directed to this court:

> ... that all further proceedings with respect to this appeal are stayed pending submission of the Bankruptcy Judge's written certification and

> accompanying materials to this Court....

On August 16, 1988, this court ordered that one of the Debtors, Mrs. Shirley M. Kearing, shall:

> appear in this Court on September 14, 1988, at 3:00 p.m., and show cause why she should not be punished for civil contempt of court because of her misconduct in failing to obey, comply with and carry out the provisions of the order granting the Motion to Compel Cooperation of the Debtors filed by the Trustee, duly entered herein on April 25, 1988, as set forth in the memorandum in support of the Motion for Issuance of Show Cause Order served on Shirley M. Kearing by mail on May 19, 1988.

Regardless of the fact that this court is, itself, in contempt of the District Court's order, the sanctions of the bankruptcy judge to punish are beyond the authority of the bankruptcy court for the District of Columbia as stated by the "Omega ruling" which does not allow this court to inflict such mulct. See In re Omega Equipment Corp., 51 B.R. 569 (Bkrtcy.

DC DC 1985).

In the "Omega ruling," Judge Jackson, who also is the assigned judge to the Debtor's appeal in this bankruptcy proceeding and is the judge who ordered the "stay" above, stated in the "Omega" case that the:

> present question whether a United States bankruptcy court, established by Congress under Article I of the Constitution, possesses the power of judicial contempt as among those inherent in its general powers conferred by 11 U.S.C. Section 105. The Court [that is, the District court for the District of Columbia] concludes that, as is the case with U.S. magistrates and other non-Article III adjudicative officers, BANKRUPTCY JUDGES AT PRESENT CANNOT BE, AND HAVE NOT BEEN, ENDOWED WITH CONTEMPT POWER, BUT RATHER, IN MATTERS OF CONTEMPT ARE LIMITED TO THE SUBMISSION OF PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW TO THE PARENT FEDERAL DISTRICT COURT, WITH A FINAL ADJUDICATION OF CONTEMPT TO EMANATE, IF AT ALL, FROM THE DISTRICT JUDGE FOLLOWING DE NOVO REVIEW.

Debtors believe that this court has far exceeded its authority, knowingly and

willfully, in violation of both the "stay of all proceedings" and of its authority for any "contempt" sanctions. Until such time as these matters - that is, the entire appellate proceeding now pending in the District Court for the District of Columbia - are resolved the Debtors must decline, in compliance with the District Court's "stay order," to participate in any further activities in the bankruptcy court for the District of Columbia which deal with the bankruptcy court's order "to compel cooperation by debtors;" or for that matter, any proceedings in which the appointed trustee is allowed any standing.

Debtors have submitted this "statement of intent;" and to the best of their knowledge, information and belief, formed after inquiry, maintain that this "statement of intent" is well grounded in fact and is warranted by existing law and

that this intent is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation or indeed, abuse of process; but is in the "interests of justice" and the rights and protections granted the Debtors under Article V of the United States Constitution.

Dated: September 14, 1988

/s/ Shirley M. Kearing
Shirley M. Kearing, Debtor, Pro Se

/s/ Leon R. Kearing, M.D.
Leon R. Kearing, Debtor, Pro Se

FILED JULY 12, 1988

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

In Re	)	
	)	
LEON R. AND	)	Case No. 86-00913
SHIRLEY M. KEARING,	)	(Chapter 11)
Debtors	)	

ORDER DENYING CONTINUANCE
ON HEARING ON ORDER TO SHOW CAUSE

Upon reading and consideration of the application of Leon R. and Shirley M. Kearing, the Debtors, for an order to continue the July 13, 1988 hearing on the order to show cause why the Debtors ought not to be held in civil contempt, it is

ORDERED that the application for continuance is DENIED.

Dated: July 12, 1988.

/s/ S. Martin Teel, Jr.
S. MARTIN TEEL, JR.
United States Bankruptcy Judge

FILED MAY 19, 1988

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

In re:	)	
Leon R. and	)	
Shirley M. Kearing	)	Case No. 86-00913
Debtors.	)	(Chapter 11)

DECLARATION OF JOHN W. GUINEE, JR. TRUSTEE
IN SUPPORT OF MOTION FOR ISSUANCE
OF SHOW CAUSE ORDER

District of Columbia, ss:

John W. Guinee, Jr., Trustee herein, hereby declares pursuant to 28 USC § 1746 as follows:

1. On December 15, 1987, this Court appointed me Trustee in the above-referenced matter.

2. As of the date of this affidavit, I have not received from the debtors any of the money or documents required to be turned over to the Trustee by the debtors pursuant to this Court's April 25, 1988 order.

3. On May 3, 1988, I spoke with Ms.

Kearing, debtor herein, and made arrangements to meet her at her house located at 4801 Van Ness Street, N.W., Washington, D.C., to discuss with her the various bankruptcy matters.

3. [sic] When I arrived at her house at the designated time, Mrs. Kearing was not home. I waited outside the home for a reasonable period of time, and Mrs. Kearing never showed up.

4. [sic] While at the home, I had an opportunity to observe the condition of the grounds. The grass had not been cut and the overall condition of the exterior of the property was poor.

5. [sic] On May 5, 1988, I had an opportunity to discuss with Mrs. Kearing her failure to show up for our appointment. We also discussed the fact that she had not turned over the various documents and information that the court had ordered her

to turn over in its April 25, 1988 order. At that time, Mrs. Keraing informed me that she had no intention of ever complying with the court order. She indicated taht she was willing to go to jail before so complying.

7. It has become so clear to me that without further order of this court, the debtors will continue to interfere with my performance of my statutory duties.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 15th day of May 1988.

/s/ John W. Guinee, Jr.
John W. Guinee, Jr., Trustee

FILED MAY 19, 1988

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

In re:	)	
Leon R. and	)	
Shirley M. Kearing	)	Case No. 86-00913
Debtors.	)	(Chapter 11)

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF MOTION FOR ISSUANCE
OF SHOW CAUSE ORDER

In support of his Motion for Issuance of Show Cause Order, John W. Guinee, Jr., Trustee, by counsel, respectfully states as follows:

1. On April 25, 1988, this Court filed and entered an order granting the Motion to Compel Cooperation by Debtors filed by the Trustee (the "Order"). A copy of the Order is attached hereto as Exhibit A.

2. The Order specifically requires the debtor Shirley Kearing to: (1) turn over to the Trustee the funds of Debtors at the American Security Bank, N.A. (the Court finding that these funds represented rents

for three condominium units then comprising part of the bankruptcy estate, which were received after the Trustee was appointed); (2) immediately turn over to the Trustee any and all rents that she may in the future collect from the tenants of Units 201, 502 and 504, 4444 Connecticut Avenue, N.W., Washington, D.C., and (3) direct said tenants to make all future rent payments directly to the Trustee.[7]

3. The Order also specifically requires Ms. Kearing to mail to the Trustee by April 17, 1988[8] "copies of all bank statements, cancelled checks, deposit slips

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[7] Subsequently to the entry of the Court's Order, the Trustee executed deeds in lieu of foreclosure so that the condominium units are no longer part of the estate.

[8] While the order was not filed and entered until April 25, 1988, this April 17, 1988 deadline was set by the Court in its order from the bench. Ms. Kearing was present at this hearing and was aware of this date.

and withdrawals slips for the Debtors' account at American Security Bank, N.A."

4. The Debtors were also ordered to cooperate with the Trustee and his agents in an effort ot obtain offers to p;urchase the real property located at 4801 Van Ness Street, N.W., Washington, D.C. Specifically, the Court directed the Debtors to maintain the premises in a clean and orderly condition.

5. Debtors have failed and refused to comply with and have disobeyed and disregarded the provisions of the Order.

6. As more particularly shown by the Affidavit of John W. Guinee, Jr. attached hereto as Exhibit B, the debtors have disregarded two written requests (See Exhibit C) and have failed to turn over to the Trustee the funs of the Debtors at American Security Bank, N.A. The Debtors have also failed to furnish to the Trustee

copies of all bank statements and other records of accounts at American Security Bank.

7. In addition, the Debtors have not maintained the Van Ness premises in a clean and orderly condition. While the Trustee has not been permitted access to the interior portions of the house, the yard is in total disarray. The grass has not been cut and the weeds are overgrown.

8. On Tuesday, May 3, 1988, the Trustee spoke with Mrs. Kearing and arranged to meet her at her house to discuss the bankruptcy. Mrs. Kearing failed to keep this appointment.

9. Obviously, the Debtors have failed and refuse to comply with the Order. In fact, Mrs. Kearing has informed the Trustee that she has no intention of ever complying with the provisions of the Order.

10. By reason of the failure and

refusal of the Debtors to comply with the provisions of the Order, the Trustee has been prevented from performing his statutory duties.

WHEREFORE, the Trustee moves this Court for an order requiring the Debtors to answer and show cause why they should not be adjudged in contempt of this Court, and, upon return of said order, to adjudge the Debtors in contempt of this Court for having violated and disregarded the terms of the Order, and for such other relief as this Court deems appropriate.

Respectfully submitted,

/s/ Renee Franklin Hill

Peter R. Kolker #25478
Renee Franklin Hill #383932
ZUCKERMAN, SPAEDER, GOLDSTEIN,
TAYLOR & KOLKER
1201 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 778-1800

Counsel for the Trustee

FILED MAY 19, 1988

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

In re:	)	
Leon R. and	)	
Shirley M. Kearing	)	Case No. 86-00913
Debtors.	)	(Chapter 11)

MOTION FOR ISSUANCE
OF SHOW CAUSE ORDER

John W. Guinee, Jr., Trustee herein, by counsel, hereby moves this Court for entry of an order requiring Leon R. and Shirley M. Kearing, debtors, to show cause why they should not be held in contempt for failure to comply with this Court's Order Granting Motion To Compel Cooperation By Debtors, filed and entered by this Court on April 25, 2988. A Memorandum in support of this Motion and a proposed Order are attached hereto.

Respectfully submitted,

/s/ Renee Franklin Hill
Peter R. Kolker #25478
Renee Franklin Hill #383932
ZUCKERMAN, SPAEDER, GOLDSTEIN,
TAYLOR & KOLKER

1201 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 778-1800

Counsel for the Trustee

FILED APRIL 11, 1988

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

In Re	)	
	)	
LEON R. AND	)	Case No. 86-00913
SHIRLEY M. KEARING,	)	(Chapter 11)
Debtors	)	

ORDER AUTHORIZING EMPLOYMENT OF
COUNSEL UNDER GENERAL RETAINER

At Washington, D.C., this 7th day of April, 1988:

Upon the application of John W. Guinee, Jr., Trustee herein, praying for authority to employ and appoint Zuckerman, Spaeder, Goldstein, Taylor & Kolker under a general retainer to represent the trustee herein, and upon the Affidavit of Peter R. Kolker, Esquire, a member of Zuckerman, Spaeder, Goldstein, Taylor & Kolker is duly qualified to represent the Trustee before this Court and the Court being satisfied that Zuckerman, Spaeder, Goldstein, Taylor & Kolker represents no interests adverse to

the bankruptcy estate or in the matters upon which it is to be engaged, that its employment is necessary and would be in the best interests of the estate and its creditors, and that the case is one justifying a general retainer, and it appearing that no notice or hearing on said application may be given, it is

ORDERED, that John W. Guinee, Jr., Trustee herein, is authorized to employ the law firm of Zuckerman, Spaeder, Goldstein, Taylor & Kolker generally, as attorneys for the trustee and the estate, with compensation to be paid in such amounts as may be allowed by the Court upon proper application or applications thereof.

/s/ S. Martin Teel, Jr.
S. MARTIN TEEL, JR.
United States Bankruptcy Judge

FILED FEBRUARY 8, 1988

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

In Re)
)
LEON R. AND)
SHIRLEY M. KEARING,)
Debtors)

MOTION TO COMPEL
COOPERATION BY DEBTORS

John W. Guinee, Jr., Trustee herein, moves this Court to compel the Debtors to cooperate with the Trustee in all matters relating to the administration of the estate in this proceeding and, specifically, in the listing of the real property located at 4801 Van Ness St., N.W., Washington, D.C. ("Property"), presently occupied by Debtors, and for reasons therefor states as follows:

1. He is the duly appointed, qualified and acting Trustee in these proceedings.

2. In his business judgement [sic], sale of Property, which sale will recapture

substantial equity for use in the administration of the estate and/or to be used as the basis for construction of a Plan of Arrangement for the reorganization contemplated in these proceedings, is necessary at this time.

3. Delay in listing the property [sic] for sale will frustrate the efforts to determine, by exposure in the market place, the true value of the asset, to the detriment of all parties.

4. In earlier states of this proceeding, Debtors solicited sale of Property and included its sale in a Plan of Arrangement filed with this Court on August 10, 1987.

5. On information and belief, on or about January 16, 1988, Debtors refused entry to the premises of an agent selected by the Trustee to estimate a fair market price for Property, thus interfering with

the Trustee in the performance of his duties. Trustee has been informed that Debtors, or one of them, stated that admission would not be permitted unless a court order were to be presented.

6. Initial analysis of the economic condition of the estate, in the opinion of the Trustee, indicates that the equity which appears to be "locked into" Property must be recovered either to pay for litigation proposed by Debtors (as to which litigation Trustee takes no position at this time) or to provide a monetary base for the structuring of a Plan of reorganization.

7. It appears that it is the intent of the Debtors to reverse previous positions taken during the proceedings and to delay by various means, some of which are allready [sic] under way, the orderly administration of the case, a possibilitty

[sic] which has been noted by this Court.

8. No firm determination as to the disposition of Property need be made at this time, nor is such firm determination requested herein. All that will result immediately from the granting of this motion is the listing for sale subject to court approval at a later time of any contract sale.

9. It appears that a clarification of the duties of the Debtors vis-a-vis the Trustee in the carrying out of his duties is needed at this time, not only for the benefit such clarification will provide to the Trustee but also as instruction to the Debtors.

WHEREFORE, the premises considered, your movant requests that Debtors be instructed to make Property available for inspection by an agent to be designated by the Trustee, at all reasonable times until

further Order of this Court, that Debtors be instructed to cooperate with Trustee and his agent(s) in the efforts to obtain offers to purchase the property, by agreeing to the affixing to the property of a lock-box or other device which will facilitate entry into the property by duly licensed real estate agents, by maintenance of the premises in a clean and orderly condition, so as to make the premises attractive to prospective purchasers and assist in obtaining high prices in any offers to purchase, and to cooperate with Trustee in every other effort which he undertakes in the fulfillment of his statutory duties.

Alternatively, Trustee requests that Debtors be ordered to vacate Property within two weeks, and to leave premises in a "broom clean" condition.

Respectively submitted,

/s/ John W. Guinee, Jr.

John W. Guinee, Jr.
P.O. Box 2038
Reston, Virginia 22090
703 435 3782

FILED JANUARY 19, 1988

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

In Re:	)	
Leon R. and	)	Case No. 86-00913
Shirley M. Kearing	)	(Chapter 11)
Debtors	)	
	)	

PRAECIPE

The Clerk will please enter the enclosed Bond, as of December 15, 1987 covering the Trustee appointed in this case.

/s/ John W. Guinee, Jr.
John W. Guinee, Jr.
P.O. Box 2038
Reston, Virginia 22090
(703) 435 3782

FILED JANUARY 14, 1988

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

In Re:	)	
Leon R. and	)	Case No. 86-00913
Shirley M. Kearing	)	(Chapter 11)
Debtors	)	
	)	

EMERGENCY APPLICATION
FOR A TEMPORARY RESTRAINING ORDER
AND MOTION FOR A STAY OF ORDER
PENDING APPEAL

COMES NOW, Leon R. and Shirley M. Kearing, Debtors, by and through their attorney, Michael R. Huffstetler, and moves this Honorable Court to issue during the pendancy of an appeal filed on January 14, 1988, of the final orders of the United States Bankruptcy Court for the District of Columbia, a restraining order against the appointed trustee, John W. Guinee, and the granting of a motion for a stay of order for appointment of a trustee pending appeal.

As grounds in support of their emergency

application, the Debtors state as follows:

1. That this Honorable Court has jurisdiction over this Application pursuant to 28 U.S.C. Section 1334(d); F.R.Civ.P. 62(d), 65; 11 U.S.C. Section 105(a); Bankruptcy Rule 7065, 8005.

2. That the Debtors, Leon R. and Shirley M. Kearing, filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code on December 10, 1986.

3. That on, or about, January 4, 1988, the Bankruptcy Court for the District of Columbia, filed and entered three (3) final orders:

> (a) denial of "emergency application for removal of the Chapter 11 trustee, John W. Guinee, Jr., and for appointment of an examiner;"
>
> (b) the denial of Debtors', pro se, "application for debtors-in-possession for leave to hire attorney and payment of administrative expense for debtors' counsel interim compensation" and "affirmation in support of debtors' application for retention of

counsel," and

(c) "turnover of funds of the Debtors'estate."

4. That the United States Trustee never consulted with any parties in interest as to his appointment of John W. Guinee, Jr., as Trustee as required by 11 U.S.C. Section 1104(c).

5. That the Trustee, John W. Guinee, Jr., did not file any acceptance of appointment, or was not approved by the Court as required by 11 U.S.C. Section 322(a), and Bankruptcy Rules 2008 and 2010(c).

6. That the Trustee, John W. Guinee, Jr., has neither investigated "the acts, conduct, assets, liablities, and financial condition of the debtor[s]" nor "file[d] a statement of any investigation" as required by 11 U.S.C. Section 1106[3] and [4](A).

7. That the Trustee has, in writing, notified the Debtors of:

(a) his intention to dispose of real property of the estate;

(b) his plans to enter into settlement agreements on other real property; and

(c) full payment of all claims - a so-called "100% plan" - whether or not debtors consent, or even have the ability, to carry out such a plan.

(d) his approval to the application of the previous attorney for compensation even though Debtors have, as debtors in possession, filed written objections to that compensation with no notice or hearing being held to date.

8. That the Trustee has not, in writing, notified the debtors of:

(a) any transfer of estate funds from debtors' previous attorney's escrow account or if, in fact, a new account has even been opened; and

(b) the fact that he has neither requested nor received any of the files from Debtors'previous attorney.

9. That the debtors' current attorney has requested the complete file on this

bankruptcy proceeding but the previous attorney has denied the release of the debtors' files, the Clerk of the Bankruptcy Court has been unable, or unwilling, to present a complete file of the proceedings for viewing to date and the Trustee has been of no assistance in obtaining any files.

8. That the debtors did not file this application in the Bankruptcy Court due to that Court's:

> (a) denial of debtors application for removal of trustee that dismissed all reasons given for rescission of the appointment of that trustee (of which 4, 5, 6 and part of 7 above herein were included) as "... none..." being "... meritorious;"
>
> (b) adverse rulings affecting both the debtors and the creditors by allowing the sale of an income-producing property at less than fair market value, converting the proceeds to cash collateral and then ordering the payment of administrative expenses;
>
> (c) entering of consent orders for reaffirmationof pre-petition debts

without any plan whatsoever being proposed or submitted;

(d) allowing repossession of debtors' automobile without notice and hearing and ruling;

(e) refusal to allow debtors in possession use of any cash collateral funds for basic upkeep of the estate, maintenance of property or emergency funds;

(f) total neglect for notice and hearing and ruling on Debtors motion on November 6, 1987, for appointment of an examiner before the Court's appointment on December 9, 1987, of a trustee;

(g) appointment of a trustee almost one year to the day from the filing of the order for relief, thereby relieving debtors as debtors in possession on the grounds of "incompetence," even though as debtors had complied with all Court orders and Code provisions for a debtor in possession;

(h) failure to direct the U. S. Trustee to appoint a creditors' committee pursuant to 11 U.S.C. Section 1102(a)(1), or respond to any of the Debtors pleas for help in this proceeding;

(i) currently sitting judge will be replaced on February 8, 1988.

WHEREFORE, Debtors pray this Honorable

Court:

1. That a temporary restraining order against said trustee be granted to protect and prevent the rights of the Debtors and all parties in interest from the use or abuse of the Trustee's powers as allowed by 11 U.S.C. Section 362(e) and (m), as said trustee has written that he intends to sell, transfer or remove said property of the estate, thereby giving sufficient cause for the dissipation of assets of this estate.

2. Unless temporarily restrained from so doing, immediate and irreparable injury, loss, or damage will result to this estate before notice can be served and a hearing had on an application for such temporary restraining order.

3. That a stay of the order for the appointment of a trustee and for other relief pending appeal be granted.

Dated: January 14, 1988

/s/ Michael R. Huffstetler
by R. Clifton
Michael R. Huffstetler
Bar No. 375672

Ivins, Phillips & Barker
1700 Pennsylvania Avenue, N.W.
Washington, D. C. 20006

(202) 393-7600

FILED DECEMBER 23, 1987

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

In Re:	)	
Leon R. and	)	Case No. 86-00913
Shirley M. Kearing	)	(Chapter 11)
Debtors	)	
	)	

EMERGENCY APPLICATION FOR REMOVAL OF TRUSTEE AND APPOINTMENT OF AN EXAMINER

TO: Honorable George F. Bason, Jr., Bankruptcy Judge

The emergency application of Leon R. Kearing and Shirley M. Kearing, by their attorney respectfully represents:

1. This emergency application is pursuant to 11 U.S.C. §§ 324(a) and 1105 seeking the removal of a trustee in these proceedings and reinstatement of the applicants as debtors in possession.

2. The petition for relief was filed herein on December 10, 1986, and applicants were debtors in possession until John W. Guinee, Jr., was appointed trustee in these

proceedings by the United States Trustee on December 16, 1987, pursuant to a court order dated December 9, 1987.

3. Applicant should be reinstated as debtors in possession because of events and conditions that existed at the time the Court ordered the U.S. Trustee to appoint a trustee, some of which were unknown to the Court, and because of subsequent events and conditions with respect to the actual performance, or lack of performance, by the United States Trustee and the trustee in office.

(a) On January 20, 1987, debtors filed with the Clerk of the Court a notice of their change of address from 4341 Embassy Park Drive, N. W., Washington, D. C. 20016, to the current address of 4801 Van Ness Street, N. W., Washington, D. C. 20016 (see Exhibit A).

(b) On April 15, 1987, Chevy Chase Savings Bank, F.S.B., by its counsel, David N. Prensky, Esq., filed a motion to convert this case to a chapter 7 proceeding, or in the alternative, to appoint a trustee (see Exhibit B). No notice or hearing was held.

(c) On July 17, 1987, Chevy Chase Savings Bank, F.S.B., by its counsel, David N. Prensky, Esq., filed a praecipe to withdraw, without prejudice, the motion to convert this case to a chapter 7 proceeding or, in the alternative, to appoint a trustee (see Exhibit C).

(d) On October 6, 1987, Leon R. and Shirley M. Kearing, acting as debtors in possession, pro se, filed a personal plea for intervention by the Court concerning their bankruptcy. This document was presumably forwarded to the Office of the United States Trustee (see Exhibit D).

(e) On the same day, October 6, 1987, again as debtors in possession, pro se, the Kearings filed a document requesting a hearing on: (1) the application fee by their then attorney, Alfred Lawrence Toombs, Esq.; and (2) debtors' request for consent to handle the sale of the property at 4801 Van Ness Street, N.W., Washington, D.C. (see Exhibit E). No notice or hearing was held.

(f) On October 26, 1987, the Kearings relieved their attorney, Alfred Lawrence Toombs, Esq., from further representation and also sent copies of their letter to the U.S. Bankruptcy Court, and the U.S. Trustee by way of the Court (see Exhibits F and G).

(g) On November 6, 1987, the debtors were notified by letter (and later by telephone) of a hearing on: (1) the Application by Alfred Lawrence Toombs, Esq., For Leave to Withdraw as

Counsel for Debtor in Possession and response by debtors thereto; (2) Request for Approval of the Sale of Real Property at 4801 Van Ness Street, N.W., Washington, D.C.; and (3) Application by Debtors' Counsel for Supplemental Award of Compensation (see Exhibit H).

(h) On November 6, 1987, debtors in possession, pro se filed an Application for: (1) an Expedited Hearing for the Removal of Debtors' Attorney (Mr. Toombs) for Failure to Perform All of the Duties of an Attorney; (2) Revocation of the Order Awarding Debtors' Counsel Interim Compensation and Expenses; (3) Denial of Subsequent Compensation and Expenses to Mr. Toombs; and (4) Request for Appointment of an Examiner (see Exhibit I).

(i) At the hearing, held on November 6, 1987, the Court urged that the debtors in possession retain new counsel to represent them as debtors in possession in these proceedings and that an appearance by counsel should be entered on or before December 7, 1987; or that in the even debtors in possession failed to avail themselves of new counsel during that period the Court intended, unless cause to the contrary be timely show, to appoint a trustee pursuant to 11 U.S.C. § 1104(a) (see Exhibit J)

(j) The Clerk of the Court was ordered to give to all creditors and parties in interest twenty days notice, in the form prescribed by B.R. 2002 of the renewal, at the hearing of November

6, 1987, of the motion previously filed herein by Chevy Chase Savings Bank, F.S.B. for the appointment of a trustee pursuant to 11 U.S.C. § 1104(a) (see Exhibit J). Notice to the debtors was sent to the 4341 Embassy Park Drive address and debtors received late notification after December 1, 1987.

(k) On December 7, 1987, debtors in possession filed with the Court an Application for Leave to Hire an Attorney and For Payment of Administrative Expenses for Debtors' Council Interim Compensation (see Exhibit K).

(l) On December 9, 1987, the Court ordered the appointment of a trustee (see Exhibit L).

(m) On December 16, 1987, the U.S. Trustee, pursuant to the Court's order, appointed John W. Guinee, Jr. as trustee.

(n) On December 17, 1987, debtors received correspondence from John W. Guinee, Jr. (see Exhibit M).

Reasons for Rescission of
Court Order to Appoint Trustee
and Removal of Appointed Trustee

Chevy Chase Savings Bank, F.S.B., by motion for appointment of trustee under 11 U.S.C. § 1104, after notice and hearing, would have been entitled to the appointment

of a trustee upon a showing for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor. By withdrawal of its motion on July 17, 1987, however, it was no longer entitled to hearing.

By renewal of its motion for appointment of a trustee on November 6, 1987, Chevy Chase Savings Bank, F.S.B. should have recited new allegations as to its request, but it failed to furnish any information or evidence that would provide a basis for the allegations. In the absence of any such showing, the appointment of a trustee would serve no benefit to any of the parties in interest involved and should be been denied. In Re Bel Air Associates, Ltd., Debtor, 4 Bankr. 168; 2 Collier Bankr. Cas.2d (MB) 103; 6 Bankr. Ct. Dec. (CRR) 284, May 2, 1980; affd. 706 F.2d 301 (10th Cir. 1983).

Debtors filed an application, as debtors in possession, pro se to hire an attorney and for payment of administrative expenses for debtor's [sic] counsel interim compensation, on December 7, 1987, prior to the Court's order for appointment of a trustee, and within the Court's mandated deadline for the appearance of an attorney. No response was made by the Court.

Even assuming, arguendo, that the appointment of a trustee is appropriate, the order for appointment leaves the responsibility to the U.S. Trustee to actually select the trustee after consultation with parties in interest. 11 U.S.C. § 1104(c). This was not done.

On December 17, 1987, John W. Guinee, Jr., notified debtors that he had been appointed and qualified as their trustee. No filing of acceptance by John W. Guinee, Jr., of appointment, or approval by the

Court has been made as required by 11 U.S.C. § 322(a) and B.R. 2008 and B.R. 2010(c).

Even assuming, arguendo, that the trustee was duly appointed and qualified, 11 U.S.C. §1106[3] requires that the trustee ... investigate acts, conduct, assets, liabilities, and financial condition of the debtor ... and [4](A) ... file a statement of any investigation.

The December 17, 1987, letter from Mr. Guinee states that he has only conversed with the former attorney (Mr. Toombs), counsel for one creditor (Standard Federal Savings and Loan Association) and with one of the debtors (Mrs. Kearing), and that he intends to proceed with various actions even though the letter is dated one day after his appointment as trustee.

Debtors, upon information and belief, have determined that these actions are

contrary to the best interests of the estate, and that the trustee must be removed.

Request for Granting Debtors' Request for Appointment of an Examiner

The debtors' request for appointment of an examiner should, however, be granted. The Court did not respond to the expedited motion by the debtors for appointment of an examiner. Additionally, the U.S. Trustee should have begun on October 6, 1987 (but no later than November 6, 1987) to fulfill his duties and obligations as required by 28 U.S.C. §§ 586(3)(A), (B), (F) and (G).

The debtors had requested assistance in the supervision and progress of their case and the monitoring for compensation and reimbursements filed under 11 U.S.C. § 330, and the debtors had made allegations that their estate was in jeopardy due to the actions of their then current attorney (Mr. Toombs). No action was, or has been,

forthcoming on debtors' motion for the appointment of an examiner.

If the Court does not order the appointment of a trustee, then, pursuant to 11 U.S.C. § 1104(b) the Court shall appoint an examiner to investigate any allegations of fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the debtors' affairs, if requested by a party in interest, and after notice and hearing, and if such appointment is in the interests of creditors, any equity security holders, and other interests of the estate.

The appointment of a trustee on December 9, 1987, does not comport with judicial economy as set out in H.R. 95-595, at page 402, where Congress stated in part:

> Generally, a trustee would not be needed in any case where the protection afforded by a trustee could equally be afforded by an examiner.

Ultimately, the appointment of an examiner depends upon whether the appointment is in the best interests of creditors and other interests of the estate; the question is one that is equitable and discretionary with the Court. In Re Lenihan, 6, BCD 368, 2 CBC 72 (D. R.I. 1980)

Additionally, the cost, expenses and benefits should be weighed and examined. In Re American Bulk Transport Co., an Iowa Corporation, Debtor, 8 Bankr. 337 Ct. Dec. (CRR) 279, December 15, 1980. No such weighing of costs and benefits has occurred in this case.

Wherefore, applicant respectfully requests that, for the reasons outlined above, after a notice and a hearing, the Court's order for the appointment of a trustee be rescinded, and that John W. Guinee, Jr., be removed as trustee, and

that, alternatively, an examiner be appointed in this case.

/s/ Michael R. Huffstetler
Michael R. Huffstetler
Bar No. 375672

Ivins, Phillips & Barker
1700 Pennsylvania Avenue, N.W.
Suite 600
Washington, D. C. 20006
(202) 393-7600

FILED DECEMBER 16, 1987

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

In Re:	)	
Leon R. and	)	Case No. 86-00913
Shirley M. Kearing	)	(Chapter 11)
Debtors	)	
	)	

APPOINTMENT OF TRUSTEE
AND DESIGNATION OF REQUIRED BOND

Pursuant to 11 U.S.C. §1104, John W. Guinee, 1514 Inlet Court, Reston, Virginia 22090, is hereby appointed trustee for the estate of the above named debtors.

The bond required of the trustee in this case is hereby fixed at $50,000.00. The bond amount may be increased from time to time by the United States Trustee.

December 15, 1987

/s/ John E. Waites [NED] or [NEO]
John E. Waites
United States Trustee
for Region Four
421 King Street, Suite 410
Alexandria, Virginia 22314
(703) 557-0746

FILED NOVEMBER 6, 1987

NOTE:

ON NOVEMBER 9, 1988, ATTORNEY ALFRED LAWRENCE TOOMBS FILED AN EMERGENCY APPLICATION FOR PROTECTIVE ORDER CITING 11 U.S.C. § 107(b)(2) and BANKRUPTCY RULE 9018(2). ON DECEMBER 3, 1987, THE BANKRUPTCY COURT ISSUED A PROTECTIVE ORDER DELETING WHAT FOLLOWS AS STRIKE-OUTS FOR CONTAINING EITHER SCANDALOUS AND DEFAMATORY MATTER WHICH COULD DAMAGE THE PROFESSIONAL STANDING AND REPUTATION OF THE APPLICANT.

FILED NOVEMBER 6, 1987

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

In Re	)	
	)	
LEON R. AND	)	Case No. 86-00913
SHIRLEY M. KEARING,	)	(Chapter 11)
Debtors in possession	)	

APPLICATION FOR EXPEDITED HEARING FOR REMOVAL OF DEBTORS' ATTORNEY FOR FAILURE TO PERFORM ALL OF THE DUTIES OF AN ATTORNEY, AND FOR REVOCATION OF ORDER AWARDING DEBTORS' COUNSEL INTERIM COMPENSATION AND EXPENSES, AND DENIAL OF SUBSEQUENT COMPENSATION AND EXPENSES, AND REQUEST FOR APPOINTMENT OF AN EXAMINER

Debtors, Leon R. and Shirley M. Kearing, debtors in possession, pro se, hereby request that the Bankruptcy Court hold an expedited hearing on their application for removal of debtors' attorney, revocation of order awarding debtors' counsel interim compensation and expenses, and denial of subsequent compensation and expenses, and request for appointment of an examiner, and assigns the following reasons for this request:

1. Debtors employed attorney, Alfred Lawrence Toombs, on or about 21 November, 1986, for legal representation for debtors in a Chapter 13 proceeding only.

Debtors executed a written agreement for attorney to perform services at the rate of $2,500.00 cash retainer and $125.00 per hour thereafter, plus out of pocket expenses.

2. No other chapter proceedings agreement was signed.

3. Attorney filed Chapter 11 proceedings on 10 December, 1986, without written agreement or approval of debtors and without debtors being informed of the consequences of filing a petition under Chapter 7, 11, 12, or 13 of Title 11, U.S.C., and the relief available under each such chapter of Title 11 as required by Section 322 of Public Law 98-353, July 10, 1984, 98 Stat. 333.

4. Debtors never received copies of either the voluntary petition or the statement of affairs for a debtor not engaged in business.

5. Attorney, however, signed Exhibit "B" of the voluntary petition which is an unsworn declaration, under penalty of perjury, that debtors had been so informed of the relief available under each such chapter.

6. Debtors had availed themselves to legal counsel as their financial dilemma posed serious problems in need of counsel, but attorney informed debtors that they had no need to discuss the various chapters of bankruptcy as "that's what you pay me for," ~~a rather flippant, callous and high handed attitude toward distressed and concerned debtors~~.

7. Debtors' health, well-being and estate have been, and still may be, in

jeopardy and the debtors and their estate have lost valuable property and money due to ~~the lack of generally recognized conduct of professional ethics as evidenced by~~ attorney's action, to wit:

(a) Attorney has ~~aggressively badgered~~ debtors about the real property of the estate and the urgency and necessity, in his opinion, of disposing of the said real property and depositing any cash into an escrow account of which only the attorney is payee;

(b) Attorney has billed hours upon hours on unauthorized "~~wheeling and dealing~~" ~~with~~ real property of the estate and has, to date, settled one final sale of such real property -- and that at a $26,000.00 price <u>below</u> the appraised fair market value;

(c) With exception to debtors' earned wages, attorney has deposited all monies of the estate in two accounts of which he is payee and only one of which is interest bearing;

(d) Any settlements with claims or contracts have been ~~haphazard,~~ at loss to the estate of funds or potential funds;

(e) ~~Attorney has continually harassed and harangued both debtors, and children of debtors, both at home and work by telephone, mail, messenger and in person;~~

(f) ~~Attorneys [sic] work product does not justify any fees for any services rendered;~~

(g) Attorney has refused to release any funds from the escrow account for basic upkeep of the

estate, maintenance of property or emergency funds for debtors;

(h) Failure to release funds have caused debtor [sic] police arrest and ticketing of two illegal automobiles needed for debtor's use in conducting his affairs and work;

(i) ~~Debtors' tenants in all three apartments at 4444 Connecticut Avenue have been berated by attorney by telephone and mail;~~

(j) ~~Attorney coereed~~ debtors to pay $700-$750.00 every two weeks for approximately $6,700.00 in fees to attorney out of debtor's wages;

(k) Attorney demanded and received all stocks of debtors and all credit cards which remain in his possession;

(l) Attorney has repeatedly informed debtors that their real

property must be disposed of or that secured creditors will immediately, and without court authorization, auction said real property;

(m) ~~Attorney has debased debtors to others by impugning their sanity;~~

(n) Attorney has presented plans that are unworkable due to his enormous fees and total disregard of debtors' age and ability to generate income for next several years;

(o) And, attorney has continually and regularly submitted his fees for court approval ~~and has totally disregarded his fiduciary capacity to debtors and their creditors.~~

6. [sic] ~~Debtor [sic] believes that chicanery has been used by the attorney and~~

~~is-in-gross-violation-of-Rules-of Professional-Conduct-of-the-American-Bar Association-and-that-attorney-may-be-in danger-of-criminal-prosecution-under~~ 18, USC, §152, [sic] ~~which~~ states that

> Whoever knowingly and fraudulently gives, offers, receives or attempts to obtain any money or property, remuneration, compensation, reward, advantages, or promise thereof, for acting or forebearing to act in any case under Title 11; ... shall be punished by a fine of not more than $5,000, or imprisoned not more than five years, or both.

7. [sic] ~~Debtors-have-made-initial contact-with-the-grievance-committee-of-the federal-bar-and-intends-[sic]-to-pursue that-remedy,-as-well-as-the-D.C.-local-bar grievance-committee.~~

Debtors pray the court that debtors' counsel interim compensation and expenses be revoked and denial of subsequent compensation and expenses be made, and requests appointment of an examiner to:

(a) Pursue an investigation into

the deeds and action of attorney ~~and to proceed to find if, in fact, attorney has used fraud, dishonesty, incompetency, misconduct, mismanagement or irregularity in the management of the affairs of the debtors~~ pursuant to Title 11, U.S.C. § 1104(b).

/s/ Leon R. Kearing
Leon R. Kearing - Debtor In Possession

/s/ Shirley M. Kearing
Shirley M. Kearing - Debtor In Possession

MISSING FROM BANKRUPTCY COURT FILES

4801 Van Ness Street, N.W.
Washington, D.C. 20016
October 26, 1987

Mr. Alfred Lawrence Toombs, Esq.
Suite 820
1401 New York Avenue
Washington, D.C. 20005-2102

RE: LEON AND SHIRLEY KEARING
BANKRUPTCY CASE NO. 86-913

Dear Sir:

Because of your deliberate attempt to mislead us into believing you were our trustee appointed by the court and to willfully take advantage of our situation and naivete by charging excessive legal fees and depleting our estate bringing undue suffering and pain, you are relieved from further representation as of this date October 26, 1987.

Sincerely,
/s/ Leon R. Kearing, M.D.
LEON R. KEARING, M.D.
/s/ Shirley M. Kearing
SHIRLEY M. KEARING

cc. U.S. Trustee
U.S. Bankruptcy Court

FILED OCTOBER 6, 1987

TO:
U.S. BANKRUPTCY COURT CHAPTER 11
FROM: SHIRLEY AND LEON R. KEARING 86-913

SUBJECT: APPLICATION FEE OF LAWYER ALFRED LAWRENCE TOOMBS

We would like a hearing on the application fee of our lawyer Alfred Lawrence Toombs and to be able to handle our own selling of our residence 4801 Van Ness St., N.W., Washington, D.C. We have experience buying and selling real estate and can handle the complete transaction for ourselves, thus avoiding large legal fees

/s/ Leon R. Kearing, M.D.

/s/ Shirley Kearing

FILED OCTOBER 6, 1987

October 6, 1987

TO: ~~Judge Bason~~ US Trustee

FROM: Shirley and Leon Kearing

SUBJECT: CHAPTER 11 CASE NO. 86-913

It concerns us very much why our bankrupcy [sic] is causing us such pain and suffering. We are living without hot water and heat plus driving illegally with two cars in need of repair and not registered in the District of Columbia. We have never done anything against the law in our entire lives and now all that we do is illegal. Leon has been arrested and searched, handcuffed, and sent to a detention cell because of a non registered [sic] car.,[sic]

Shirley has been stopped by Police and removed from her car on the way to do an errand. Police had car towed away and gave

Shirley a ride to the bus stop.

LEON has been heating hot water in the morning to take a bath to go to work. He has been out of work for four days because of burns on leg and feet carrying boiling water upstairs.

Judge Bason, we are really hurting both physically and mentally while our attorney is getting rich because of our plight. We don't want to be in bankruptcy and even though we are selling our assets, our creditors still are not getting paid. The entire amount of our profit from Millwood Rd [sic] went for legal fees. Now we are selling our home with an estimated bill of $20,000 for legal fees bringing the total of $67,000 just in legal fees alone. Leon hasn't even earned that so far this year. Please help us get out of this bankruptcy AS SOON AS POSSIBLE.

Respectfully,

/s/ Leon R. Kearing, M.D.

/s/ Shirley Kearing

Our lawyer is aware of all of the above.

FILED JULY 17, 1987

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

In Re:	)	
Leon R. and	)	Case No. 86-00913
Shirley M. Kearing	)	(Chapter 11)
Debtors	)	
	)	

PRAECIPE

Clerk:

Please withdraw without prejudice the Motion to Convert Case to Chapter 7 Proceeding or, in the alternative, to Appoint Trustee of Chevy Chase Savings Bank, F.S.B. filed in the above-captioned cause on April 15, 1987.

CHASEN & CHASEN

By: /s/ David N. Prensky
David N. Prensky

3301 New Mexico Avenue, N.W.
Washington, D.C. 20016
(202) 244-4000

Counsel for Chevy Chase Savings Bank, F.S.B.

FILED APRIL 15, 1987

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

In Re:	)	
Leon R. and	)	Case No. 86-00913
Shirley M. Kearing	)	(Chapter 11)
Debtors	)	
	)	

MOTION TO CONVERT CASE TO CHAPTER 7 PROCEEDING OR, IN THE ALTERNATIVE, TO APPOINT TRUSTEE

CHEVY CHASE SAVINGS BANK, F.S.B. ("CHEVY CHASE"), by undersigned counsel, pursuant to 11 U.S.C., Section 1104 and 1112, moves that the above-captioned cause be converted to a proceeding under Chapter 7 of the Bankruptcy Code or, in the alternative, that a trustee be appointed to administer the debtors' estate, and in support therefor states as follows:

1. This cause was commenced by debtors on December 10, 1986, by the filing of a petition for relief under Chapter 11 of the Bankruptcy Code.

2. CHEVY CHASE is a secured creditor

of the debtors, holding a purchase money note secured by a first deed of trust against the real property described as Lot 20 in Square 1530, improved by the premises known as 4801 Van Ness Street, N.W., Washington, D.C. As of the date of filing of the debtors' petition for relief, the balance owing under the said note was in the sum of $261,900.70. At the time this action was commenced, debtors were in default under the terms of their note, the prepetition arrearages amounting to $14,493.24.

3. Debtors are in possession of the Van Ness property, but they have not made any payments to CHEVY CHASE under its note since the commencement of this action. The postpetition arrearages presently amount to $9,360.41.

4. More than 120 days have elapsed since the filing a [sic] debtors' petition

for relief, and the debtors have not filed a plan of reorganization. Such delay has been and will continue to be prejudicial to debtors' creditors in that the debtors are accruing additional debt while the value of their assets relative to such debt is diminishing. Movant believes that the debtors have demonstrated an inability to effect a plan of reorganization, and that the debtors are not competent to manage the affairs of their estate.

5. Movant further believes that conversion of this cause to a Chapter 7 proceeding would be in the best interests of the creditors and the estate by enabling the debtors' assets to be liquidated in a timely and orderly manner while there is still potential equity in the property. If, however, the Court is not willing to convert this case, then a trustee should be appointed so that an effective plan of

reorganization may be proposed or such other action as may be appropriate may be recommended to the Court.

WHEREFORE, movant requests that the Court convert this proceeding to a case under Chapter 7 of the Bankruptcy Code or, in the alternative, appoint a trustee pursuant to Section 1104 of the Code.

Respectfully submitted,

CHASEN & CHASEN

By: /s/ David N. Prensky
David N. Prensky

3301 New Mexico Avenue, N.W.
Washington, D.C. 20016
(202) 244-4000

Counsel for Chevy Chase Savings Bank, F.S.B.

POINTS AND AUTHORITIES

1. 11 U.S.C., Section 1104, 1112, and 1121.

2. Record of proceeding herein.

CHASEN & CHASEN

By: /s/ David N. Prensky
David N. Prensky

FILED DECEMBER 23, 1987

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

In Re:	)	
Leon R. and	)	Case No. 86-00913
Shirley M. Kearing	)	(Chapter 11)
Debtors	)	
	)	

PRAECIPE

This January 20, 1987,

THE CLERK OF THE COURT WILL note that Debtors' address has been changed to:

4801 Van Ness St. NW
Washington, DC 20016

Respectfully submitted,

/s/ Alfred Lawrence Toombs

Alfred Lawrence Toombs
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FILED
JAN 28 1991
JOSEPH F. SPANIOL, JR.
CLERK

90-1217

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1990

Shirley M. Kearing,
Petitioner,

v.

The Honorable S. Martin Teel, Jr., et al,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
For the District of Columbia

APPENDIX E
CONSTITUTIONAL & STATUTORY PROVISIONS
RULES OF PROCEDURE

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Federal Constitutional Provisions

U. S. Const. art I, Sec. 1

U. S. Const. art II, Sec. 1

U. S. Const. art III, Sec. 1

U. S. Const., amend. V [1791]

U. S. Const. art. I, Sec. 8, cl.4.

Federal Statutes

Section 322 of Pub.L. 99-353,
July 10,1984

Section 283(aa) of Pub.L. 99-554,
October 27, 1986:

11 U.S.C. 101(13)(A)

11 U.S.C. 101(30)(A)

11 U.S.C. 101(39)

11 U.S.C. 105

11 U.S.C. 322(a)

11 U.S.C. 326(d)

11 U.S.C. 327(a)

11 U.S.C. 328(c)

11 U.S.C. 329(b)

11 U.S.C. 330

11 U.S.C. 363(m)
11 U.S.C. 503(b)(1)(A)

11 U.S.C. 503(b)(2)

11 U.S.C. 521(3)

11 U.S.C. 1102(a)(1)

11 U.S.C. 1104(a)

11 U.S.C. 1104(b)

11 U.S.C. 1104(c)

11 U.S.C. 1106(a)

11 U.S.C. 1107

11 U.S.C. 1129(b)(2)(B)

18 U.S.C. 1961(1)(D)

28 U.S.C. 157(a)

28 U.S.C. 157(b)(1)

28 U.S.C. 157(b)(2)(A)

28 U.S.C. 158(a)

28 U.S.C. 157(d)

28 U.S.C. 332(d)(1)

28 U.S.C. 372(c)

28 U.S.C. 566(a)

28 U.S.C. 586(a)(3)(A)

28 U.S.C. 586(a)(3)(B)

28 U.S.C. 586(a)(3)(F)

28 U.S.C. 586(a)(3)(G)

28 U.S.C. 586(A)

28 U.S.C. 586(B)

28 U.S.C. 586(F)

28 U.S.C. 586(G)

28 U.S.C. 1334(b)

28 U.S.C. 1334(c)(1)

28 U.S.C. 1334(c)(2)

28 U.S.C. §1983

Federal Rules of Civil Procedure

Federal Rules of Appellate Procedure

Rules of Practice and Procedure in Bankruptcy

Federal Rule of Appellate Procedure 2

Federal Rule of Appellate Procedure 5

Federal Rule of Appellate Procedure 8

Federal Rule of Appellate Procedure 25

Federal Rule of Appellate Procedure 27

Federal Rule of Appellate Procedure 27(c)

Federal Rule of Appellate Procedure 47

Federal Rule of Civil Procedure 10

Federal Rule of Civil Procedure 11

Federal Rule of Civil Procedure 12

Federal Rule of Civil Procedure 12(b)(1)

Federal Rule of Civil Procedure 12(b)(4)

Federal Rule of Civil Procedure 12(b)(5)

Federal Rule of Civil Procedure 12(b)(6)

Rule 2013 & 2013(b) & (c) of the Rules of Bankruptcy Procedure

Rule 2016 of the Rules of Bankruptcy Procedure

Rule 8005 of the Rules of Bankruptcy Procedure

Rule 8013 of the Rules of Bankruptcy Procedure

Rule 9011 of the Rules of Bankruptcy Procedure

Rule 9020 of the Rules of Bankruptcy Procedure

Supreme Court, U.S.
FILED
APR 10 1991
OFFICE OF THE CLERK

(7)

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IN THE SUPREME COURT OF THE UNITED STATES
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Respondents.

On Writ of Certiorari to the
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For the District of Columbia

PETITIONER'S REPLY TO FEDERAL RESPONDENTS' OPPOSITION

Shirley M. Kearing, Pro Se
For the Petitioner
4200 Cathedral Avenue, N.W.
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(202) 244-6198

How exhilarating to petitioner that the federal respondents admit a conflict exists between the Circuit Courts of Appeals concerning contempt powers of bankruptcy judges.

Petitioner does not concur, however, that

> ... the issue is not presented for resolution in this case because the federal respondents are in any event entitled to dismissal of the action against them.-[1]

Petitioner posits that it is precisely the resolution of whether or not a bankruptcy judge has contempt powers that must be determined by this Court.

But Respondents would have the Court ignore this monumental question by diverting its attention to "immunity" and "failure to state a claim."

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[1] Brief for the Federal Respondents in Opposition, Argument, -1, p.7.

Here, the federal respondents have grossly misconstrued postulate for premise. In their attempt to use the principle governing reliable inference these respondents have done no more in their brief -- from the first sentence in the Statement to the last sentence in the Argument -- than "beg the question."

Using the same faulty reasoning as the district court, the federal respondents have picked out, to liberally lift two limpid terms from the writings of a noted jurist, their "darling" in the "nursery" from the Federal Rules of Civil Procedure as their first line of defense -- Rule 12(b)(6).

These respondents should not be coddled by Rule 12(b)(6) since petitioner rebuffs that puisne "brat" by invoking her pro se protection found in Haines v. Kerner,

404 U. S. 519, 92 S.Ct. 594, 30 L.Ed2d 652 (1972), thereby stating that her allegations,

> ... however inartfully pleaded, are sufficient to call for the opportunity to offer supporting evidence.

Petitioner agrees with the federal respondents' use of Stump v. Sparkman, 435 U.S. 349, and this Court's explanation and example at p. 356-7 along with citing from Bradley, 13 Wall., at 352. Petitioner has no quarrel with judicial immunity, per se; but does "bankruptcy judge" mean a "judge" as this Court has so determined?

Semantics nothwithstanding, 28 U.S.C. 151 provides that

> [i]n each judicial district the bankruptcy judges in regular active service shall constitute a unit of the district court to be known as the bankruptcy court for that district.

And, too,

> [e]ach bankruptcy judge, [is] ... a judicial officer of the district court ....

The last sentence in 28 U.S.C. 152(a)(1) strengthens this subservience:

> Bankruptcy judges shall serve as judicial officers of the United States district court established under Article III of the Constitution.

Buttressed by the "Omega ruling"[2] in the District of Columbia and the 5th and 9th Circuits' opinions[3], petitioner maintains this Article I "judge" has wandered into pastures exclusively reserved for Article III adjudication and that this Article I "judge" is not "absolutely immune" when he was alerted by petitioner of a "clear absence of ALL jurisdiction" for contempt sanctions by him. And, too, by having his employee, the clerk of the bankruptcy court -- who, incidentally, serves at the

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[2] In re Omega Equip. Corp., 51 Bankr. 569 (D.D.C. 1985).

[3] In re Sequoia Auto Brokers, Ltd., 827 F.2d 665 (4th Cir. 1989) and In re Hipp, Inc., 895 F.2d 1503 (5th Cir. 1990).

bankruptcy judge's leisure and is under his direct control and supervision -- present the United States Marshals with that infernal contempt order, there can not be the extension of "absolute immunity" granted to him either. And for that matter, there should be no immunity for any of the other respondents in petitioner's complaint.

Federal respondents also assert petitioner cannot state Respondeat Superior claim. Petitioner refers federal respondents to Haynesworth v. Miller, 820 F.2d 1245 (DC Cir. 1987), at 1262 [13]:

> [...I]n order to find a supervisory official personally liable in damages for the unconstitutional acts of his subordinate, it must be shown that he was responsible for supervising the wrongdoer; that a duty to instruct the subordinate to prevent constitutional harm arose from the surrounding circumstances; and that, as a result of the officials failure to instruct, the petitioner was harmed in the manner threatened.

And then, in footnote 139, page 1263, supra:

> ... reasonable inferences ... [are] not circumscribed by this court's admonition in Hobson v. Wilson, [737 F.2d 1 (DC Cir. 1984), cert. denied, 470 U.S. 1084, 105 S.Ct. 1843, 85 L.Ed.2d 142 (1985)], that allegations of unconstitutional motive be pleaded with some specificity. The claim ... is not founded upon any malicious intent ... but upon ... acquiescence in the wrongful acts of others. Since the underlying constitutional violation --including the motive element -- has been set forth with sufficient particularity, we are at liberty to draw reasonable inferences with regard to ... implication therein.

Federal respondents contend that petitioner fails to state a Bivens claim. Again, federal respondents either have not read or they have completely misread what Bivens decided; viz., as applicable to this particular complaint petitioner's allegations against federal respondents, as individuals named in the above-captioned complaint and ACTING in an official capacity, stated her due process rights had

been violated and that comports exactly with Bivens.

And, if the federal respondents find the original complaint somewhat vague then the blame must lie somewhere in Haines, supra, p. 520, wherein "the allegations of the pro se complaint" must be held "to less stringent standards than the formal pleadings drafted by lawyers."

Federal respondents also state that petitioner failed to meet the "heightened pleading standard." This argument may or may not be valid[4]; regardless, petitioner has no trepidation expressing violation of due process under the Fifth Amendment of the Constitution of the United States which lead to her illegal arrest and incarceration. Petitioner is alleging a

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[4] Siegert v. Gilley, cert. granted, 111 S. Ct. 292 (1990) (argued Feb. 19, 1991).

"specific deprivation of rights" that are "clearly established."

Petitioner would also, in this response, bring to this Court's attention that the federal respondents rely on the sequence of events in the bankruptcy proceeding as spun by other respondents which is tenuous at best. Inaccuracies abound. Sloth rather than sleuth, no doubt, hampered the federal respondents' diligent study of petitioner's bankruptcy file (even though voluminous) to discover the precarious position they now find themselves.

For example, there was but one supposed creditor -- now known to petitioner not as a secured creditor but an unidentified and unrecognized agent for a secured creditor -- who, barren of any standing in the bankruptcy court, requested a trustee without presenting any evidence whatsoever at a noticed hearing. Both requisites,

evidence and hearing, are required by the Bankruptcy Code before appointment of a trustee.[5]

And, too, the federal respondents failed to explain to this Court that a request for an examiner[6] to investigate the shenanigans going on in the bankruptcy proceeding was made by petitioner prior to any request for a trustee and the bankruptcy court totally ignored (and has continued to ignore) this request while the United States Trustee, inter alia, twiddled.

All the respondents have become entangled in their own webs of deceit -- not only undermining the protections afforded the petitioner by the United States Constitution but usurping the laws that champion those rights thereunder.

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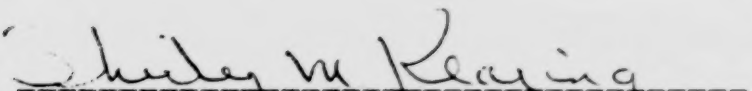
[5] 11 U.S.C. 1104(a).

[6] 11 U.S.C. 1104(b).

> No social or moral order can sustain itself, much less flourish, unless it can affirm, reinforce, and reify the fundamental values that define it. By placing the moral and coercive powers of the state behind those norms, tort adjudication performs these central ritualistic, symbolic functions. When the law immunizes official violations of substantive or procedural rules, leaving their victims without remedy, the integrity and universality of those rules and their underlying public values are called into serious question.[7]

Accordingly, petitioner should be "entitled to an opportunity to offer proof" and prays this Court grant her petition for certiorari.

Respectively submitted,



SHIRLEY M. KEARING, Pro Se
For the Petitioner

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[7] P. Schuck, Suing Government - Citizen Remedies for Official Wrongs (1983).

AFFIDAVIT OF SERVICE

I, Shirley M. Kearing, depose and say that I am the petitioner in the foregoing case, and that on April 10, 1991, pursuant to Rule 28.5(c), Rules of the United States Supreme Court, I personally served three (3) copies of the foregoing "Petitioner's Reply to Federal Respondents' Opposition," consisting of 10 pages, on each of the parties required to be served as follows:

Honorable Kenneth W. Starr
Office of Solicitor General
Department of Justice
Room 5143
10th & Constitution Avenue, N. W.
Washington, D. C. 20530

Jay B. Stephens, Esq.
U. S. Attorney for the District of Columbia
555 4th Street, N.W.
Washington, D. C. 20001

Peter R. Kolker, Esq.
1201 Connecticut Avenue, N. W.
Washington, D. C. 20036

All parties required to be served have been served.

Shirley M. Kearing

SHIRLEY M. KEARING, Pro Se
For the Petitioner

Subscribed and sworn to before me on the 16 day of April, 1991.

Notary Public, D. C.

My commission expires:

Dec 14, 1992